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RECORD, CASE NO. 14775.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. ~~1301~~. 862

THE UNITED STATES, APPELLANT,

vs.

THE COLTON MARBLE AND LIME COMPANY, O. T. DYER, ——— ARCHIBALD AND W. S. WILSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED JULY 25, 1891.

RECORD, CASE NO. 14775.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO., 1301.

THE UNITED STATES, APPELLANT,

vs.

THE COLTON MARBLE AND LIME COMPANY, O. T. DYER, —— ARCHIBALD AND W. S. WILSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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1 *Caption.*

In the circuit court of the United States of the ninth judicial circuit in and for the southern district of California.

THE UNITED STATES OF AMERICA, COMPLAINANTS, *vs.* THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants.	No. 88.

TRANSCRIPT ON APPEAL.

2 *Bill of complaint.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE COLTON MARBLE & LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants.	Bill in Equity.

To the judges of the circuit court of the United States for the southern district of California:

The United States of America, by A. H. Garland, Attorney-General thereof, brings this, its bill, against the Colton Marble & Lime Company, a corporation organized and existing under and by virtue of the laws of the State of California, O. T. Dyer, W. S. Wilson, and Archibald, each citizens of the State of California, and thereupon your orator shows that the following described land, situate in San Bernardino County, California, to wit, north ½ section nineteen, township two north, range four west, S. B. M., was acquired by the United States of America from Mexico in 1846 and confirmed by treaty of Guadelupe Hidalgo in 1848, and was then public land of the United States.

3 Your orator further shows that by the act of Congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," Congress incorporated the Atlantic and Pacific Railroad Company and granted to said company a large amount of lands in the State of California and other States and Territories.

It is enacted by said act of Congress as follows:

"SECTION 3. That there be and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not

mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under
4 the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers; provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

"SEC. 4. That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States shall appoint three Commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the Commissioners shall so report, under oath, to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said land situated opposite to and coterminous with said completed section of said road, and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid and verified by said commissioners to the
5 President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

"SEC. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed excepting those hereby granted to said company.

"SEC. 18. That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of
6 land subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations as to time and manner with the Atlantic and Pacific Railroad herein provided for."

Your orator further shows that said Atlantic and Pacific Railroad Company duly accepted said grant and proceeded to construct said road, and on or about March 12, 1872, did designate the line of said road by a plat thereof, which it filed in the office of the Commissioner of the General Land Office, and all the odd sections of public lands on each side of said road for thirty miles were thereupon withdrawn from market and reserved from sale.

Your orator further shows the court that by section 23 of an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," it was provided as follows:

"That for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of Calfornia is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866.
7 "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

Said Southern Pacific Railroad Company accepted said grant, and on April 3, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the Commissioner of the General Land Office, and did construct and complete said road in the manner and within the time prescribed, except that it did not connect with the Texas & Pacific Railroad.

Your orator further shows that by the act of Congress approved July 6, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes," all the lands and rights to lands in California theretofore granted and conferred upon said Atlantic and Pacific Railroad Company were forfeited, resumed, and restored to entry for noncompletion of that portion of said railroad to have been constructed in California.

Your orator further shows that the lands described lie and are situate in the county of San Bernardino and State of California, in odd-numbered sections, within 20 miles of the route of the road of the Southern Pacific

Railroad Company, as shown by its designated route of location filed in the office of the Commissioner of the General Land Office pursuant
8 to said grant and act of Congress of March 3, 1871, and said lands are also within the thirty-mile limits but outside of the twenty-mile limits of the line of road as designated and filed by the said Atlantic and Pacific Railroad Company in the office of the Commissioner of the General Land Office, and are located in odd-numbered sections within the so-called indemnity limits of the latter named railroad company.

That at the time the route of location of said Atlantic and Pacific Railraid was filed on March 12, 1872, there was within the twenty-mile or primary limits of said road situated opposite to the tracts described aforesaid and on the same side of said road a large amount of land which had previous to that time been granted, sold, reserved and otherwise appropriated, which amounted to more in the aggregate than the amount of the said lands described, but no selection of indemnity in lieu thereof has been made by the Government or by said railroad company.

Your orator further shows that the lands described were then and at all times have been agricultural lands, and of greater value than other lands in the indemnity limits of said Atlantic and Pacific Railroad Company.

Your orator further shows that said lands have never been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of by the United States, or by the Mexican or Spanish Governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein, but your orator alléges that said lands were from July 27, 1866, till July 6, 1886, subject
9 to the prospective rights and the right of selection of and by said Atlantic & Pacific Railroad Company.

Your orator alleges upon information and belief that the defendants herein claim an interest in the lands in suit herein described, under and through said grant of March 3, 1871, to said Southern Pacific Railroad Company, but the nature and extent of such claims are unknown to your orator, and your orator asks that defendants each answer fully disclosing the nature and extent thereof. That all the lands in suit herein were claimed by said Atlantic and Pacific Railroad Company as a part of the grant from July 27, 1866, till July 6, 1886.

Your orator alleges that defendants and neither of them have any title or interest in or to said lands, legal or equitable, and that said lands were never granted to said Southern Pacific Railroad Company, but are still owned by the plaintiff.

Your orator further alleges that the defendants, unlawfully claiming to own said lands, deny the plaintiff's right and title thereto; and have been during the past year and are now wantonly and unlawfully cutting and destroying the natural timber on said lands without any license or authority and to the plaintiffs' great and irreparable injury.

Your orator further shows that there are now on said lands about two thousand cords of wood which the defendants have unlawfully cut from said lands, and that for the past two years the defendants have cut other wood from said lands unlawfully, and have disposed of the same to divers parties to your orator unknown, and realized therefrom large sums of
10 money, and defendants are now removing from said lands the wood cut thereon and are threatening to remove all said wood, and unless enjoined will do so to the great and irreparable injury of the plaintiff.

Your orator further shows that the amount in controversy herein exceeds the sum or value of $2,000, exclusive of interest and costs.

In tender consideration whereof, and for as much as the plaintiff is remediless at and by the strict rules of the common law, and can only be relieved in a court of equity, your orator prays that its title to said lands may be quieted, and that the defendants, and each of them, be forever enjoined from asserting or claiming any right or title thereto adverse to the plaintiff, and your orator prays that the defendants, each, and their agents be forever enjoined from cutting any tree or wood upon said land, and from in any way injuring the trees growing thereon (and from removing or causing to be removed from said land any wood or timber now cut thereon or hereafter cut thereon).

Your orator further prays for an accounting from the defendants for all the wood sold by them and each of them, and for all money and profit realized therefrom, and for such other and further relief as the court may deem equitable in the premises.

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, di-
11 rected to defendants, the Colton Lime & Marble Company, O. T. Dyer, W. S. Wilson, and Archibald, enjoining them and each of them from asserting any right, claim, or title to said land, and from denying plaintiff's title thereto, and enjoining them each from cutting any tree or wood now on said land (and from removing any wood or timber now cut on said land).

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the Colton Lime & Marble Company, O. T. Dyer, W. S. Wilson, and Archibald, commanding them each, on a certain day, and under a certain penalty therein to be inserted, to be and appear before your honors and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience, and your orator will ever pray.

Your orator expressly waives answer under oath by the defendants and each of them.

A. H. GARLAND,
Attorney-General.
By GEORGE J. DENIS,
United States Attorney for the Southern Dist. of Cal.
GEORGE J. DENIS,
United States Attorney.
JOSEPH H. CALL,
Counsel.

12 *Interlocutory order.*

In U. S. circuit court, so. dist. Calif.

UNITED STATES
vs.
THE COLTON MARBLE & LIME CO. ET AL. } Interlocutory order at chambers.

Upon reading and considering the bill now on file in the above-entitled suit, the plaintiff having prayed for a temporary restraining order and

for an injunction enjoining the defendants The Colton Marble & Lime Co., O. T. Dyer, W. S. Wilson, and Archibald, from cutting any tree or wood upon & from removing any wood or timber from the north ½ sec. 19, tp. 2 north, range 4 west, S. B. M., it is thereupon ordered that at the November rule, to wit, the first Monday of November, 1888, at 10 o'clock a. m., at the United States court room in Los Angeles, California, the above-named defendants shall show cause, if any there be, why such injunction as prayed for shall not be issued; and it is further ordered that until otherwise ordered by this court, or by a judge thereof, that the above-named defendants each, their agents and employees, restrained from cutting any wood, timber, or trees upon said land.

Witness my hand this 16th day of October, A. D. 1888.

Ross,
District Judge.

(Endorsed:) No. 88. In the United States circuit court, south-
13 ern district of California. The United States of America vs. The Colton Marble & Lime Co. and others. Bill. Filed October 15th, 1888. Wm. M. Van Dyke, clerk. A. H. Garland, Attorney-General. George J. Denis, U. S. district attorney. Jos. H. Call, for plaintiff.

14 *Amendment to bill.*

In the circuit court of the United States, southern district of California.

THE UNITED STATES OF AMERICA
vs.
THE COLTON MARBLE AND LIME Company *et al.* } Amendment to bill.

The plaintiff in the above-entitled suit amends its bill therein by striking out on page 6 all the words from the 18th to 27th line, inclusive, and by inserting in lieu thereof the following averment: Your orator further shows that the defendants during the past year have cut and sold from said land to diverse parties to your orator unknown large amounts of wood of great value, and have realized as profits from such sales large sums of money which your orator alleges on information and belief exceeds the sum or value of $5,000.00."

The plaintiff also amends said bill by striking out on page 7 on the 11th line commencing with the words "and from removing" to and including the 12th and 13th lines. Also by striking out on page 7, on the 26th and 27th lines, the words "and from removing any wood or timber on said land."

A. H. GARLAND,
Attorney-General, for Plaintiff.
By GEORGE J. DENIS,
United States Attorney.
JOSEPH H. CALL,
Counsel.

15 GEORGE J. DENIS,
United States Attorney.

(Endorsed:) 88. In U. S. cir. ct. United States vs. Colton Marble & Lime Company. Amendment to bill. Filed October 17th, 1888. Wm. M. Van Dyke, clerk. Joseph H. Call, counsel.

16 *Subpœna.*

United States of America. Circuit court of the United States, ninth circuit, southern district of California. In equity.

The President of the United States of America, greeting: To The Colton Marble and Lime Company, O. T. Dyer, Archibald, and W. S. Wilson.

You are hereby commanded, that you be and appear in said circuit court of the United States aforesaid, at the court room in Los Angeles, on the third day of December, A. D. 1888, to answer a bill of complaint as amended, exhibited against you in said court by the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of October, in the year of our Lord one thousand eight hundred and eighty-eight and of our Independence the one hundred and thirteenth.

[SEAL.] WM. M. VAN DYKE,
Clerk.

17 Memorandum pursuant to rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of December next, at the clerk's office of said court, pursuant to said bill as amended; otherwise the said bill as amended will be taken pro confesso.

WM. M. VAN DYKE,
Clerk.

Marshal's return.

UNITED STATES MARSHAL'S OFFICE,
Southern District of California.

I hereby certify that I received the within writ on the 17th day of October, 1888, and personally served the same on the 18th day of October, 1888, and personally served the same on the 18th day of October, 1888, by delivering to and leaving with O. T. Dyer, M. Archibald, W. S. Wilson, and on the Colton Marble and Lime Company by service on W. S. Wilson, president of said company, said defendant named therein, personally, at the county of San Bernardino in said district, a certified copy thereof, together with a certified copy of the bill of complaint, attached thereto.

Los Angeles, Oct. 20th, 1888.

D. R. RISLEY,
U. S. Marshal,
By THOMAS B. HAYES,
Deputy.

(Endorsed:) No. 88. U. S. circuit court, ninth circuit, southern district of California. In equity. The United States of America vs. The Colton Marble and Lime Company et als. Subpoena. Filed October 25th, 1888. Wm. M. Van Dyke, clerk.

18 *Amendment to bill.*

In the circuit court of the United States, southern district of California.

THE UNITED STATES OF AMERICA
vs.
THE COLTON MARBLE AND LIME COMPANY ET AL. } Amendment to bill.

The above-named plaintiff amends its bill on file herein—

1st. By striking out and from the files the amendment to said bill heretofore filed, to wit, in October 17, 1888.

2nd. By striking out the words "April 3, 1871," on the 8th line of the fourth page, and inserting in lieu thereof the words "about the year 1874."

A. H. GARLAND,
Attorney-General of the United States.
GEORGE J. DENIS,
U. S. Attorney, and
J. H. CALL,
Assistant United States Attorney, and of Counsel.

(Endorsed:) The above-named defendants consent to the filing of the foregoing amendments, but without shortening the time of defend-
19 ants to demur, plead, or answer, or to enter appearance. H. C. Rolfe, Joseph D. Redding, Chapman & Hendrick, solicitors for defdts. In the U. S. cir. ct. The United States vs. The Colton Lime and Marble Company et al. Amendment to bill. Filed December 1st, 1888. Wm. M. Van Dyke, clerk.

20 *Demurrer.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE COLTON MARBLE AND LIME COMPANY AND others, respondents. } General demurrer to bill in equity.

The demurrer of respondents to the bill of complaint of the United States of America.

The respondents, be protestation, and not confessing any or all of the matters and things in the complainant's bill in equity contained to be true in such manner and form as the same is therein set forth and alleged, demur to the said bill, and for cause of demurrer show:

That said bill and the allegations and all thereof, and the separate ones thereof, and all taken together, do not show any cause for equity, or any cause of complaint against this respondent; nor do they state facts sufficient to constitute a cause of action; nor should complainant be granted any relief upon the facts alleged in said bill; nor is there any cause

21 for equity or interference on the part of this court shown, set forth, or maintained upon the allegations in said bill; nor has said complainant in or by said bill made or stated such a case as does and ought to entitle it to any such relief as is thereby sought and prayed for from and against this respondent.

*Hw*erefore, and for other good causes of demurrer appearing in said bill, respondents demur thereto, and humbly demand judgment of this court, whether they shall be compelled to make other or further answer to the said bill, and pray to be hence dismissed with their costs and charges, so far as said bill is concerned in this behalf, most wrongfully sustained.

J. D. REDDING,
H. C. ROLFE,
CHAPMAN & HENDRICK,
Solicitors, and of Counsel for Resp's.

I hereby certify that I am solicitor and of counsel for the respondents in the above-entitled cause, and that, in my opinion, this demurrer to the bill in equity of the United States of America is well founded in point of law, and proper to be filed in the above cause.

J. S. CHAPMAN,
Solicitor, and of Counsel for Resp'd's.

22 SOUTHERN DISTRICT, STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. S. Wilson, being first duly sworn, on oath says that he is the secretary of the Colton Marble and Lime Company, one of the respondents in the above-entitled action, and that the foregoing demurrer is not interposed to delay the said cause or any proceedings therein.

W. S. WILSON.

Subscribed and sworn to before me this 4th day of January, 1889.
[SEAL.] CHARLES WORTH,
Notary Public.

(Endorsed:) No. 88. In the U. S. circuit court, ninth circuit, southern district of California. United States of America, complainants, vs. Colton Marble & Lime Co. et al., respondents. General demurrer to bill in equity. Received copy of the within this 4 day of January, 1888. George J. Denis, U. S. attorney, for plaintiff. Filed Jan'y 4, 1889. Wm. M. Van Dyke, clerk, by E. H. Owen, deputy clerk. H. C. Rolfe, Joseph E. Redding, and Chapman & Hendrick, solicitors and of counsel for respondents.

23 *Amendment to bill.*

In the circuit court of the United States, southern district of California.

THE UNITED STATES OF AMERICA
vs.
THE COLTON MARBLE AND LIME Company and others. } Amendment to bill.

The plaintiff, by leave of court first obtained, amends its bill herein as follows, to wit, by inserting on the 4th page, after the 34th line, the fol-

lowing averments: "Your orator further shows that the United States, having the power and authority in that behalf, has elected, and does now elect, to hold, select, reserve, and set apart all the lands in suit herein as a part of said 20 sections per mile granted to said Atlantic and Pacific Railroad Company by said act of Congress of July 27, 1866, and which were deducted and excluded from said grant to said Southern Pacific Railroad Company, on account of said grant to said Atlantic and Pacific Railroad Company.

Your orator further shows that the route of the Southern Pacific Railroad Company, as designated by the plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, and as
24 located and constructed is, and it was necessary that it should be, upon the same general line as that of the said Atlantic and Pacific Railroad Company, as designated by the plat thereof filed by said company, as aforesaid, and all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, and are upon the same side of the designated route of the Atlantic and Pacific Railroad Company as the lands for which that company had a right to select indemnity or lieu for prior to July 6, 1886, and which right since that time has been in the United States."

A. H. GARLAND,
Attorney-General.
GEORGE J. DENIS,
U. S. Attorney.
JOSEPH H. CALL,
Assistant United States Attorney, and of Counsel.

(Endorsed:) No. 88. The United States vs. The Colton Lime and Marble Company and others. Amendment to bill. Filed January 14th, 1889. Wm. M. Van Dyke, clerk; George J. Denis, United States atty.; J. H. Call, assistant United States atty.

25 *Order overruling demurrer.*

At a stated term, to wit, the January term, A. D. 1889, of the circuit court of the United States of America of the ninth judicial circuit, in and for the southern district of California, held at the court room in the city of Los Angeles, on Monday, the 27th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Present, the honorable Erskine M. Ross, district judge.

UNITED STATES OF AMERICA, COMPLAINANTS,
vs.
THE COLTON MARBLE & LIME CO., ET ALS., defendants. } No. 88.

This cause having heretofore been submitted to the court for its consideration and decision upon the demurrer of the defendants to the amended bill of complaint of the complainants herein, and the court having duly considered the same, it is now by the court ordered that said demurrer be, and the same hereby is, overruled. It is further ordered that said defendants have ten (10) days' time within which to file their answer to said amended bill.

26 I, Wm. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court, May 27th, 1889, in the cause entitled United States of America, complainants, vs. The Colton Marble & Lime Co., et als., defendants, No. 88, and now remaining of record therein.

Attest my hand and the seal of said circuit court this 6th day of March, A. D. 1891.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed): No. 88. U. S. circuit court, so'. dist. of California. United States of America vs. The Colton Marble and Lime Co., et als. Certified copy of order. Filed March 6th, 1891, Wm. M. Van Dyke, clerk.

27 *Answer.*

No. 88. In the circuit court of the United States in and for the ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, respondents.

Answer of the respondents to the bill in equity of the United States of America, complainant, as amended.

The respondents, the Colton Marble and Lime Company, O. T. Dyer, Archibald, and W. S. Wilson, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill contained, for answer thereto, or to so much and such parts thereof as these respondents are advised it is material or necessary for them to make answer unto, answering, say:

Respondents admit the allegations on the first page of said bill, and

28 Admit the first five lines of the allegations of the bill on page 2.

Respondents deny that by the act of Congress, approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," Congress granted to said Atlantic and Pacific Railroad Company a large amount of lands in the State of California and other States and Territories.

Denies that any lands were ever granted by said act of Congress, or by any act of Congress, to the said Atlantic and Pacific Railroad Company within the State of California.

Respondents admit the remaining allegations on page 2 of said bill; and

Admit all of the allegations contained in and contents of page 3; and

Admit all of the allegations and ccontents of page 4, and all of the allegations and contents of page 5 of said bill, down to and including the words "herein provided for," namely, line 11.

Respondents deny that said Atlantic and Pacific Railroad Company duly accepted said grant or proceeded to construct said road.

Respondents deny that on or about March 12, 1872, the said Atlantic and Pacific Railroad Company did designate the line of said road by a plat thereof, which is filed in the office of the Commissioner of
29 the General Land Office, or at all.

Deny that all the odd sections of public lands on each side of said road, for thirty miles, were thereupon withdrawn from market and reserved from sale; but, on the contrary,

Respondents set forth and allege that said Atlantic and Pacific Railroad Company never did accept said grant and never did proceed to construct said road, and never did at any time, or on March 12, 1872, designate the line of said road by a plat thereof, or designate its line of road in any manner.

Respondents furthermore allege that the Atlantic and Pacific Railroad Company failed utterly to file in the office of the Commissioner of the General Land Office any line or route, or designation of line or route, of its road.

Respondents deny that the S. P. R. R. Co. did connect with said Texas and Pacific Railroad in each particular and in every manner as prescribed by law and according to the acts of Congress.

Respondents further deny that by the act of Congress approved July 6, 1866, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes," all lands and rights to lands in California having been theretofore granted or conferred upon said Atlantic and Pacific Railroad Company were forfeited, or resumed, or restored to entry for noncompletion of that portion
30 of said *portion of said* railroad to have been constructed in California, or were restored in any wise to public entry, or to any entry, or to any parties except the respondents herein pleading.

Respondents deny that said lands are within the thirty-mile limits, but outside of the twenty-mile limits of the line of road as designated and filed by the said Atlantic and Pacific Railroad Company in the office of the Commissioner of the General Land Office.

Deny that the said lands are within the limits of any line of road as designated or filed by said Atlantic and Pacific Railroad Company in the office of the Commissioner of the General Land Office or anywhere.

Deny that said lands are located in odd-numbered sections within the so-called indemnity limits of the latter named railroad company.

Deny that the lands are located in odd numbers within the indemnity limits of the Atlantic and Pacific Railroad Company.

Deny that there are, or ever were, any so-called or any kind of indemnity limits of the Atlantic and Pacific Railroad Company.

Respondents deny that at the time the route of location of said Atlantic and Pacific Railroad was filed on March 12, 1872, or at any time, there was within the twenty-mile or primary limits of said road, situated

opposite to the tracts described in said pretended patents, a large amount of land which had previous to that time been granted, sold,
31 reserved, and otherwise appropriated which amounted to more in the aggregate than the amount of lands described in said pretended patents.

Deny that no indemnity land has been selected by the Government, or said railroad company, in lieu thereof.

Respondents deny that at the time the route of location of said Atlantic and Pacific Railroad, or at any time, there was within the twenty-mile or primary limits of said road, situated opposite to the tracts described in said pretended patents, a large amount of lands which had previous to that time been granted, sold, reserved, and otherwise appropriated which amounted to more in the aggregate than the amount of the lands described in said pretended patents.

Deny that no indemnity land has been selected by the Government, or by said railroad company, in lieu thereof.

Respondents deny that the lands described in said pretended patents were more than of the value of the lands within the indemnity limits of said Atlantic and Pacific Railroad Company.

Further answering the bill in equity of the complainant in regard to the allegations above set forth,

Respondents allege that the route of the said Atlantic and Pacific Railroad in the State of California never was filed or designated in the manner prescribed by law in any office of the Interior Department, or of the Government of the United States, or at all.

32 Respondents allege that the Atlantic and Pacific Railroad Company utterly and wholly failed to designate its line and route of road in the State of California.

Respondents, further allege that said Atlantic and Pacific Railroad Company never accepted the terms of the act of Congress of July 27, 1866, above referred to.

Respondents, further answering, deny that said lands have never been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of by the United States, or by the Mexican or Spanish governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein; but, on the contrary,

Respondents allege, that the said lands were granted by the United States of America to the Southern Pacific Railroad Company by the act of Congress of March 3, 1871, above referred to; and that said Southern Pacific Railroad Company did, on April 3rd, 1871, duly file its definite map of location, according to law, in the office of the Commissioner of the General Land Office at Washington, D. C., thus perfecting its right and title to said lands; and that from and after the date last mentioned, and from and after the date of the grant, to wit, March 3, 1871, became the complete and sole owner of said lands.

Respondents deny that said lands were, from July 27, 1866, till
33 July 6, 1886, subject to the prospective rights and the right of selection of and by the said Atlantic and Pacific Railroad Company, or at all.

Respondents deny that all the lands in suit herein were claimed by the Atlantic and Pacific Railroad Company as a part of their grant, from July 27, 1866, to July 6, 1886; but on the contrary,

Respondents allege that the lands in suit herein never were claimed by said Atlantic and Pacific Railroad Company during any period of time or at all.

Respondents deny that either or any of the respondents have no title or interest in or to said lands, l'gal or equitable.

Deny that said lands were never granted to said Southern Pacific Railroad Company.

Deny that said lands are still owned by the Atlantic and Pacific Railroad Company.

Respondents deny that either respondent, or any of the respondents, unlawfully claiming to own said land, deny the complainant's right and title thereto.

Deny that either or any of the respondents have been during the past year or are now, wantonly or unlawfully cutting and destroying the natural timber on said lands without any license or authority, or to the plaintiff's great or irreparable injury, or at all, or in any manner.

Respondents deny that either or any of the respondents during the past year, or at any time, have cut or sold from said land to divers parties to, or to any parties to, the complainant unknown, or at all, any
34 amount of wood of great or any value.

Respondents deny that it or they have realized as profits from such sales a large sum, or any sum, of money which exceeds the sum or value of five thousand dollars, or which amounts to or exceeds any sum, or at all.

Respondents admit that the land in controversy herein exceeds the sum of two thousand dollars, exclusive of interest and costs; and,

Further allege that the amount in controversy exceeds the sum of five thousand and one dollars, exclusive of interest and costs.

Respondents deny that the route of the Southern Pacific Railroad Company, as designated by the plat thereof filed in the office of the Commissioner of the General Land Office, and as located and constructed, is, or that it is necessary that it should be, upon the same general line as that of the Atlantic and Pacific Railroad Company, as designated by any plat thereof filed by said company, as set forth in said bill, or otherwise.

Deny that all or any of the lands in suit herein are situated opposite to that portion of the said route which are upon the same general line, or are upon the same side of the designated route of the Atlantic and Pacific Railroad Company, as the lands for which that company h'd a right to select indemnity or lieu for prior to July 6, 1886, or at any other time; and,

35 Deny that said right or any right in or to said land or any part thereof, has since said time, or is now, in the United States.

The respondents deny all and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged, without this, that any other matter, cause, or thing in the complainant's said bill of equity contained, material, or necessary for this respondent to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true, to the knowledge or belief of these re-

spondents; all of which matters and things these respondents are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

H. C. ROLFE,
CHAPMAN & HENDRICK,
Solicitors, and of Counsel for Respondents.
JOSEPH D. REDDING,
Of Counsel for Respondents.

(Endorsed:) Original No. 88. In circuit court of the United States, ninth circuit of sou. dist. of California. United States of America, complainant, vs. Colton Marble and Lime Co. O. T. Dyer, Archibald and W. S. Wilson, respondents.

Answer. Received copy of within answer this 29th day of August,
36 1889. Joseph H. Call, special asst. U. S. atttorney. Filed, August 29th, 1889. Wm. M. Van Dyke, clerk.

37 *Notice.*

In the circuit court of the United States, southern district of California.

THE UNITED STATES OF AMERICA
vs.
COLTON MARBLE & LIME COMPANY ET AL., defendants.
} Notice of application for leave to amend bill No. 88.

To the defendants in the above-entitled suit and to their solicitors:

Please take notice that on Monday, Oct. 14, 1889, at 10 o'clock a. m., at United States court room in Los Angeles, California, the above-named plaintiff will apply to said court for leave to amend its bill of complaint in said suit by filing the amended bill, a copy of which is annexed hereto.

JOSEPH H. CALL,
Special Asst. U. S. Attorney.

Service hereof admitted Oct. 12, 1889, and consent given to file the proposed amendment.

J. D. REDDING,
H. C. ROLFE,
CHAPMAN & HENDRICK,
Sol. for Defendants.

38 *Amended bill of complaint.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE COLTON MARBLE & LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants.
} Bill in equity.

To the judges of the circuit court of the United States for the southern district of California:

The United States of America, by the Attorney-General thereof, brings this its amended bill against the Colton Marble & Lime Company, a cor-

poration organized and existing under and by virtue of the laws of the State of California, O. T. Dyer, W. S. Wilson, and ——— Archibald, each citizens of the State of California, and thereupon your orator shows that the following described land situate in San Bernardino County, California, to wit: North ½ section nineteen, township two north, range four west, S. B. M., was acquired by the United States of America from Mexico in 1846 and confirmed by treaty of Guadalupe Hidalgo in 1848, and was then public land of the United States.

Your orator further shows that by the act of Congress approved
39 July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," Congress incorporated the Atlantic and Pacific Railroad Company and granted to said company a large amount of lands in the State of California and other States and Territories.

It is enacted by said act of Congress as follows:

"SECTION 3. That there be and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims, or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office," and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other
40 lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

SEC. 4. That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under

oath to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said land situated opposite to and coterminous with said completed section of said road; and from time to time whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the
41 President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

"SEC. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or preëmption, before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those granted to said company."

"SEC. 18. That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land subject to all the conditions and limitations herein provided, and
42 shall be required to construct its road on the like regulations as to time and manner with the Atlantic and Pacific Railroad herein provided for."

Your orator further shows that said Atlantic and Pacific Railroad Company duly accepted said grant and proceeded to construct said road, and on or about March 12, 1872, did designate the line of said road by a plat thereof, which filed in the office of the Commissioner of the General Land Office, and all the odd sections of public lands on each side of said road, for thirty miles, were thereupon withdrawn from market and reserved from sale.

Your orator further shows the court that, by section 23 of an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," it was provided as follows:

"That for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same

limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866."

"Provided, however, that this section shall in no way affect or
43 impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Said Southern Pacific Railroad Company, which then existed, accepted said grant, and on April 3, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the Commissioner of the General Land Office.

Your orator further shows that by the act of Congress approved July 6, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes," all the lands and rights to lands in California theretofore granted and conferred upon said Atlantic and Pacific Railroad Company were forfeited, resumed, and restored to entry for noncompletion of that portion of said railroad to have been constructed in California, no part of said road having been constructed in California.

Your orator alleges that on December 2, 1865, a corporation was organized under the laws of the State of California by the name and style of the Southern Pacific Railroad Company, and under a general law thereof approved May 20, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto, with the corporate name of the Southern Pacific Railroad Company." Said act is printed in the statutes of Cali-
44 fornia, 1861, at page 607, and sections 2, 3, 17 (divisions first, second, and seventh), 18, 40, and 43, are as follows, to wit:

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1—

SEC. 2. The said articles of association shall set forth the name of the incorporation, the number of years the same is to continue in existence, which shall not exceed fifty years, the amount of capital stock of the company, which shall be divided into shares of one hundred dollars each, and which shall be the actual contemplated cost of constructing the road, together with the cost of the right of way, motive power, and every other appurtenance and thing for the completion and running of said road, as nearly as can be estimated by competent engineers, the names and number of the directors to manage the affairs of the company, who shall hold their office until others are elected, as shall be provided by the by-laws of the company, the place from and to which the proposed road is to be constructed, and the counties into and through which it is intended to pass, and its length as near as may be. Each subscriber to such articles of association shall personally subscribe thereto his name, place of residence, and the number of shares of stock taken by him in such company; provided, that in case a person desirous of becoming a subscriber, but compelled to be absent from the State at the time of subscribing to such articles of association, he having paid the ten per cent required by law upon his subscription, may sign the same by written proxy or power of attorney to that effect; and there shall be endorsed or attached to the

said articles so subscribed an affidavit, made by any three of the directors named therein, setting forth in substance that said amount of stock has been subscribed, and that ten per cent in cash thereon has actually and in good faith been paid in as aforesaid, and that the subscribers to said articles are all known by one or the other of the three directors to be subscribers thereto, and to be the persons so represented.

SEC. 3. Articles of association formed in pursuance of the provisions of the foregoing sections shall be filed in the office of the Secretary of State, and thereupon the persons who have, or may subscribe the same, and all persons who may, from time to time, become stockholders in such company, shall be a body politic and corporate by the name stated in such articles of association, and shall be capable in law to make all contracts, acquire real and personal property, purchase, hold, convey any and all real and personal property whatever necessary for the construction, completion, and maintenance of such railroad, and for the erection of all necessary buildings and yards, or places and appurtenances for the use of the same, and be capable of suing and being sued, and have a common or corporate seal, and make and alter the same at pleasure, and generally to possess all the powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy. A copy of any articles of association filed in pursuance of this act, and certified to be a copy by the Secretary of State or his deputy, shall, in all courts and places, be presumptive evidence of the incorporation of such company, and of the facts stated therein; and such a copy, so certified, shall be kept in the office of the secretary of the corporation subject to examination during office hours by any person.

SEC. 17. Every railroad corporation shall have power:

First. To cause such examinations and surveys for the proposed railroad to be made as may be necessary to the selection of the most advantageous route for the railroad, and for such purpose, by their officers, agents, and employees, to enter upon the lands, or waters, of any person, but subject to responsibility for all damages which they shall do thereto.

Second. To receive, hold, take and convey, by deed, or otherwise, the same as a natural person might, or could do, such voluntary grants, and donations of real estate and other property of every description, as shall be made to it, to aid and encourage the construction, maintenance and accommodation of such railroad.

Seventh. To purchase lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, or take them in the manner provided by this act; may change the line of its road, in whole, or in part, whenever a majority of the directors shall so determine, as is provided hereinafter; but no such change shall vary the general route of such road, as contemplated in the articles of association of such company.

SEC. 18. If at any time after the location of the line of such railroad, in whole, or in part, and the filing of the map thereof, as provided by this act, it shall appear to the directors of such company that the same may be improved such directors may from time to time, alter, or change, the line, in any manner the may think proper, and cause a new map to be filed in the office where the map showing the first location is filed, and may thereupon take possession of the land embraced in any such new location, that may be required for the construction and maintenance

of such new road on such new line, either by agreement with the owner, or owners, of such lands, or by such proceedings as are authorized under the provisions of this act, and use and enjoy the same in place of the line for which the new is substituted; but nothing in this act shall be so construed as to confer any powers on such companies to so change their road as to avoid any point named in their articles of association, except as provided in section 17, subdivision 17, of this act.

SEC. 40. It shall be lawful for two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets, and franchises in such manner as may be agreed upon by the board of directors of such companies so desiring to amalgamate and consolidate their interests; but no such amalgamation or consolidation shall take place without the written consent of three-fourths of the value of all stockholders in interest of each company, and no such amalgamation or consolidation shall in any way relieve such companies or the stockholders thereof from any and all just liabilities; and in case of such amalgamation or consolidation, due notice of the same shall be given by advertising for one month in at
48 least one newspaper in each county, if there shall be one published therein, into or through which such roads shall run, and also for the same length of time in one paper published in Sacramento and two papers published in San Francisco, and when the consolidation and amalgamation is completed, a copy of the new articles of association shall be filed in the office of the secretary of state. It shall be the duty of the railroad company to make and maintain a good and sufficient fence on either or both sides of their property; and in case any company do not make and maintain such fence, if their engine or cars shall kill, maim, or destroy any cattle or other domestic animals when they stray upon their line or road where it passes through or alongside of the property of the owner thereof, they shall pay to the owner or owners of such cattle or other domestic animals a fair market price for the same, unless the owner or owners of the animals or animals so killed, maimed, or destroyed shall be negligent or at fault. In any case where the railroad company have heretofore or may hereafter pay to the owner or owners of the land through which or alongside of which their road is or may be located an agreed price for making and maintaining such fence, or whenever the costs of such fence have been or may be included in the award of damages allowed and paid for the right of way for such railroad, such company shall be entirely relieved and exonerated from all claims or awards of damages arising out of the killing or maiming any animals as aforesaid in favor of all persons, or their successors or assigns, who shall thus
49 fail to construct and maintain such fence. And the owner or owners of such animals shall become responsible to the railroad company for any damage or loss which may accrue to such company from such animals being upon their railroad track by reason of the nonconstruction of such fence by said owner, unless it can be proven that such loss or damage accrued by reason of the negligence of said company, its officers, agents, or employees."

"SEC. 43. Every railroad company in this State shall, within reasonable time after their road shall be finally located, cause to be made a map and profile thereof, and the land taken and obtained for the use thereof, and the boundaries of the several countries through which said road may

run, and file the same in the office of the secretary of state; and also like maps of the parts thereof located in different counties, and file the same in the office of the clerk of the county in which said parts of said road shall be, there to remain as of record forever. The said maps and profiles shall be certified by the chief engineer, the acting president, and secretary of such company, and copies of the same so certified and filed as aforesaid shall be kept in the office of the secretary of the company, subject to examination by all parties interested."

Said corporation was formed for the purpose and with the corporate power, as stated in its articles of incorporation, of constructing, owning and maintaining a railroad from some point on the Bay of San Francisco, in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San
50 Diego to the town of San Diego, in said State; thence eastward through said county of San Diego to the eastern line of the State of California, there to connect with a contemplated railroad from the eastern line of the State of California to the Mississippi River.

Your orator further shows that, on October 11th, 1870, under and by virtue of the said general laws of the State of California authorizing two or more railroad companies to consolidate and amalgamate their capital stock, debts, property, assets, and franchises, said Southern Pacific Railroad Company, the San Francisco and San José Railroad Company, a railroad corporation then organized and existing under the laws of California, and the Santa Clara and Pajara Valley Railroad Company, also a railroad corporation then organized and existing under the laws of California, did consolidate and amalgamate their capital stock, debts, property, assets, and franchises, making a different capital, issuing new stock, and creating a new and different corporation under the name and style of the Southern Pacific Railroad Company.

Your orator further alleges that, on the 12th day of August, 1873, under and by virtue of the law of the State of California of May 20, 1861, before referred to, authorizing the amalgamation and consolidation of two or more railroad companies, the said Southern Pacific Railroad Company organized in 1870 as aforesaid, and the Southern Pacific Branch Railroad Company, each organized and then existing railroad companies under and by virtue of the laws of California, did amalgamate and consolidate
51 their capital stock, debts, property, assets, and franchises, creating a new capital stock and issuing new certificates of stock and canceling the old ones, and creating a new and different corporation by the name and style of the Southern Pacific Railroad Company, a copy of which new articles of association and incorporation are hereto attached, marked "Exhibit A B," and all the provisions of law were fully complied with in order to give effect to said new articles of incorporation.

And your orator alleges that the Southern Pacific Railroad Company, which was organized and created on August 12, 1873, by the articles of amalgamation and consolidation of said several railroad companies, as heretofore set forth, did construct and complete a railroad from Tehachapa Pass, by way of Los Angeles, to the Colorado River, in the manner and within the time prescribed in said act of Congress, in which the Southern Pacific Railroad Company therein named was authorized and empowered to do, and thereafter the commissioners appointed under said act for

that purpose did unlawfully make and file their alleged acceptance of the whole of said railroad, and there was not, and is not now, any railroad or part thereof constructed or completed under said act or between said points otherwise than as aforesaid.

Your orator further shows that the general routes of said Atlantic and Pacific Railroad Company and of said Southern Pacific Railroad Company, under said act of March 3, 1871, as said routes were located as aforesaid, cross each other in the State of California.

52 That on the south side of said route of the Atlantic and Pacific Railroad Company, within 30 miles of said route, but also within 20 miles of the designated route of the Southern Pacific Railroad Company, there was not on July 27th, 1866, nor on March 12th, 1872, nor on April 3rd, 1871, and is not now, enough public land in the odd sections to equal in amount ten (10) alternate sections per mile of the line of road of said Atlantic and Pacific Railroad Company, within such limits, for that prior to said date of July 27, 1866, the Mexican Government and the United States had sold, granted, reserved, and otherwise disposed of so great a quantity of land in those limits.

Your orator further alleges that all of the said lands before described are situated on the south side of the said designated route of the Atlantic and Pacific Railroad Company, more than 20 miles but less than 30 miles therefrom, but are less than 20 miles from the said designated route of said Southern Pacific Railroad Company.

The United States hereby elect to select, hold, and reserve these lands and except the same from any grant to the Southern Pacific Railroad Company as a part of the lands granted to, and upon the general line of the route of, the Atlantic and Pacific Railroad Company.

Your orator further shows that said lands have never been granted, sold, reserved, occupied by homestead settlers, preëmpted, or otherwise disposed of by the United States, or by the Mexican or Spanish Governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein, and are

53 not mineral lands.

Your orator alleges upon information and belief that the defendants herein claim to own said lands under and through said grant of March 3, 1871, to said Southern Pacific Railroad Company, but your orator shows that said Southern Pacific Railroad Company, to which corporation said grant was made, was dissolved and terminated by said articles of amalgamation, made as aforesaid in the year 1873, and did not build any portion of said road, and has forfeited all right to such land grant, which forfeiture your orator prays may be established as to these lands in suit herein.

Your orator further alleges that the defendants, unlawfully claiming to own said lands by virtue of mesne conveyances from and under said Southern Pacific Railroad Company, organized in the year 1870, as aforesaid, deny the plaintiff's right and title thereto; and have been during the past five years, and are now, wantonly and unlawfully cutting and destroying the natural timber on said lands without any license or authority, and to the plaintiff's great and irreparable injury.

Your orator further shows that there are now on said lands about two thousand cords of wood, which the defendants have unlawfully cut from said lands, and that for the past two years the defendants have cut other

wood from said lands unlawfully, and have disposed of the same to divers parties to your orator unknown and realized therefrom large sums of money, and defendants are now removing from said lands the wood cut thereon, and are threatening to remove all said wood, and unless enjoined
54 will do so to the great and irreparable injury of the plaintiff.

Your orator further shows that the amount in controversy herein exceeds the sum or value of $5,000, exclusive of interest and costs.

In tender consideration whereof, and for as much as the plaintiff is remediless at and by strict rules of the common law, and can only be relieved in a court of equity, your orator prays that its title to said lands may be quieted, and that the defendants and each of them be forever enjoined from asserting or claiming any right or title thereto adverse to the plaintiff, and your orator prays that the defendants, each, and their agents be forever enjoined from cutting any tree or wood upon said land, and from in any way injuring the trees growing thereon, and from removing or causeing to be removed from said land any wood or timber now cut thereon or hereafter cut thereon.

Your orator further prays for an accounting from the defendants for all wood sold by them and each of them, and for all the money and profit realized therefrom, and for such other and further relief as the court may deem equitable in the premises.

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, directed to defendants, the Colton Lime & Marble Company, O. T. Dyer, W. S. Wilson, and Archibald, enjoining them and each of them from asserting any right, claim, or title to said lands, and from denying plaintiff's title thereto, and enjoining them each from cutting any tree or wood
55 now on said land, and from removing any wood or timber now cut on said land.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the Colton Lime & Marble Company, O. T. Dyer, W. S. Wilson, and Archibald, commanding them each, on a certain day and under a certain penalty therein to be inserted, to be and appear before your honors and then and there answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience, and your orator will ever pray.

JOSEPH H. CALL,
Special Asst. U. S. Attorney and of Counsel for Plaintiff.

56 "EXHIBIT A B."

Articles of association, amalgamation, and consolidation, made and executed on this the twelfth day of August, A. D. 1873, by and between the Southern Pacific Railroad Company, of the first part, and the Southern Pacific Branch Railroad Company, of the second part:

Witnesseth, that whereas the said party of the first part heretofore, to wit, on the eleventh day of October, A. D. 1870, was duly incorporated and organized under the laws of the State of California, by the amalgamation and consolidation of the following railroad corporation, theretofore existing under the laws of said State, to wit, the San Francisco and San Jose Rail-

road Company, the Santa Clara and Pajaro Valley Railroad Company, the Southern Pacific Railroad Company, and the California Southern Railroad Company, pursuant to articles of amalgamation and consolidation of that date, by them agreed upon, which articles were subsequently amended, to wit, on the eleventh day of April, A. D. 1871, by virtue of the laws of said State, whereby said corporation became duly incorporated and organized under the laws of said State for the purpose of purchasing, constructing, owning, maintaining, and operating a continuous line of railroad from the city of San Francisco, in the State of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado River in the southeastern part of the State of California, a distance of seven hundred and twenty miles, as near as may be;

57 also a line of railroad from a point at or near Tehichipa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, a distance of three hundred and twenty-four miles, as near as may be; also a line of railroad from the town of Gilroy, in the county of Santa Clara, in said State, passing through said county and the counties of Santa Cruz and Monterey to a point at or near Salinas City, in said last-named county, a distance of forty-five miles, as near as may be; and also such branches to said lines as the board of directors of said corporation may consider advantageous to said corporation and direct to be established;

And whereas the said party of the second part was heretofore, to wit, on the twenty-third day of December, A. D. 1872, duly incorporated and organized under the laws of the State of California for the purpose of purchasing, constructing, owning, maintaining, and operating a railroad from a point on the Southern Pacific Railroad (the railroad of the party of the first part), at or near Salinas City, in the county of Monterey, southeasterly to a point in Kern County, south of Tulare Lake, intersecting the San Joaquin Valley division of the said Southern Pacific Railroad; also from a point on the above-described line, at or near San Miguel, in San Louis Obispo County; thence in a southerly direction to a point of intersection, in Los Angeles County, with the line of the said Southern Pacific Railroad running from Teh*ac'ipi* Pass, by way of Los Angeles, to Fort Yuma, said road passing into or through the counties of Monterey, San Louis Obispo, Kern, Santa Barbara and Los Angeles, and said roads, in the aggregate, being as near as may be four hundred and twenty-eight miles in length;

58 And whereas said parties believe a consolidation and amalgamation of their capital stocks, debts, properties, assets, roads, telegraphs, land, and franchises will be mutually advantageous;

And whereas more than three-fourths in value of all the stockholders in interest of each of said parties have consented in writing to such amalgamation and consolidation upon the terms and conditions hereinafter set forth;

Now, therefore, under and by virtue of the statute of the State of California, in such case made and provided, the said parties do hereby mutually covenant and agree, each with the other, to the following articles, to wit:

Article first. Said parties do hereby amalgamate and consolidate themselves into a new corporation, under the name and style of the Southern Pacific Railroad Company, which new corporation shall continue in existence for the period of fifty years from the date of these articles;

And they do further consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims, and demands of every kind whatsoever, as well in possession as in expectancy, at law or in equity, and do grant, convey, and vest the same in the said new corporation as fully as the same are now severally held and enjoyed by them respectively, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, judgments, claims, and charges thereon or in anywise affecting the same or any part thereof.

59 Article second. The object and purpose of said new corporation shall be purchase, construct, own, maintain, and operate the several lines of railroad hereinbefore described, to wit, a line of railroad from the city of San Francisco, in the State of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego to some point on the Colorado River in the southeastern part of the State of California, a distance of seven hundred and twenty miles, as near as may be; also a line of railroad from a point at or near Tehichipa Pass, by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, passing through the counties of Los Angeles, San Bernardino, and San Diego, a distance of three hundred and twenty-four miles, as near as may be; also a line of railroad from the town of Gilroy, in the county of Santa Clara, in the same State, passing through said county and the counties of Santa Cruz and Monterey to a point at or near Selinas City in said last-named county, a distance of forty-five miles, as near as may be; also a line of railroad from a point on the line thirdly above described, at or near Selinas City, county of Monterey, southeasterly through said county and into Kern County to a point south of Tulare Lake, in said last-named county, intersecting at said point the line of railroad first above described, a distance of one hundred and eighty miles as near as may be; also a line of railroad from a point on the last above-described line, at or near San Miguel, in the county of San Luis Obispo; thence in a

60 southerly direction through said county, the county of Santa Barbara, and into the county of Los Angeles to a point of intersection with the line of railroad secondly above described, to wit, the line from Tehichipa Pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, a distance of two hundred and forty miles, as near as may be; making in all fifteen hundred and nine miles, as near as may be, and such branches to said lines as the board of directors of said new corporation may hereafter from time to time establish.

Article third. The board of directors of said new corporation shall consist of seven persons, and the following-named persons shall act such as directors until their successors shall have been duly elected pursuant to the by-laws of said new corporation, hereafter to be adopted, viz: C. P. Huntington, D. D. Colton, Robert Robinson, Charles Mayne, S. T. Gage, E. H. Miller, jr., and J. L. Willcutt.

Article fourth. The capital stock of said new corporation shall be ninety million dollars divided into nine hundred thousand shares of one hundred dollars each, that sum being the contemplated actual cost of said railroads, including telegraph lines, rolling stock, motive power, shops, depots, &c.

Article fifth. Each stockholder of each said parties shall have the same number of shares of the capital stock of the new corporation which he now owns and holds of the capital stock of his respective company, upon the same terms and conditions, and shall be entitled to receive from said new corporation certificates therefor, where the same has been
61 fully paid up, upon the surrender of the certificates now held by him; and where the same has not been fully paid up, he shall receive such other evidence of his ownership as the board of directors of said new corporation shall direct, upon the surrender of such evidence of his ownership of such unpaid stock as he may now hold.

Article sixth. And the said several parties of the first and second parts, each for itself, hereby sell, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns forever, all its property, real, personal, and mixed, of every kind and description; all its capital stock, all its interest in the shares of its capital stock subscribed but not fully paid for; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description, and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon, or in any wise effecting the same.

Article seventh. The said new and consolidated company and corporation is to be liable for and shall fulfil, perform, do, and pay all and each of the contracts and agreements, covenants, duties, obligations, liabilities, debts, dues, and demands of the said several parties of the first and
62 second parts, but his amalgamation and consolidation shall not in any way relieve the said parties of the first and second parts, or the stockholders thereof, from any and all just liabilities.

In testimony whereof the said party of the first has caused this instrument to be signed by its vice-president (the president being absent) and its secretary, and its corporate seal to be thereunto affixed; and the said party of the second part has caused this instrument to be signed by its president and secretary, and its corporate seal thereunto affixed, in pursuance of orders and resolutions of their several boards of directors, made on the twelfth day of August, 1873.

[SEAL.] SOUTHERN PACIFIC RAILROAD COMPANY,
By DAVID D. COLTON, *Vice-President.*
J. L. WILLCUTT, *Secretary.*

[SEAL.] SOUTHERN PACIFIC BRANCH RAILROAD COMPANY,
By B. R. CROCKER, *President.*
By E. H. MILLER, JR., *Secretary.*

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of said Southern Pacific Railroad Company, party of the first part to the fore-

going new articles of association, amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolidation, and to the said new articles of association, this twelfth day of August, A. D. 1873.

63

LELAND STANFORD,
CONTRACT & FINANCE CO.,
Pr. W. E. BROWN, *Secy.*
MARK HOPKINS.
ROBERT ROBINSON.
S. T. GAGE.
CHAS. MAYNE.
DAVID D. COLTON.
J. L. WILLCUTT.
E. H. MILLER, JR.

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said Southern Pacific Branch Railroad Company, party of the second part to the foregoing new articles of association, amalgamating and consolidating the said parties of the first part and second parts, hereby consent to such amalgamation and consolidation, and to the said new articles of association, this twelfth day of August, A. D. 1873.

LELAND STANFORD.
E. H. MILLER, JR.
ALBERT GALLATIN.
MARK HOPKINS.
E. W. HOPKINS.
C. H. CUMMINGS.
B. R. CROCKER.

64 STATE OF CALIFORNIA, *Department of State:*

I, W. C. Hendricks, secretary of the State of California, do hereby certify that I have carefully compared the annexed copy of articles of association, amalgamation, and consolidation between the Southern Pacific Railroad Co. and the Southern Pacific Branch Railroad Co. with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also, that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of State, at office in Sacramento, California, the 5th day of September, A. D. 1889.

[SEAL.]

W. C. HENDRICKS,
Secretary of State.
By H. B. DAVIDSON,
Deputy.

(Endorsed:) 88. In the circuit court of the United States, 9th cir., S. district of California. The U. S. of America vs. Colton Marble & Lime Co. et al. Bill in equity. Filed, October 14th, 1889. Wm. M. Van Dyke, clerk. Jos. H. Call, special asst. U. S. atty. so. dist. of California.

65 *Amendment to amended bill.*

In the circuit court of the United States, ninth circuit, southern district of California.

UNITED STATES OF AMERICA *vs.* COLTON MARBLE AND LIME Company.	No. 88. Amendment to amended bill.

The above-named plaintiff amends its amended bill herein by adding after the word "did" on the 27th line of the 13th page thereof, the words "attempt without any authority from the United States to."

JOSEPH H. CALL,
Special Assistant U. S. Attorney Southern Dist. of Cal. and of Counsel for Plff.

(Endorsed:) No. 88. United States vs. Colton Marble and Lime Company et al. Amendment to amended bill. Filed October 21st, 1889. Wm. M. Van Dyke, clerk. Service admitted Oct. 21, 1889. H. C. Rolfe, J. D. Redding, Chapman & Hendrick, solicitors for defts. Joseph H. Call, sol. for plff.

66 *2nd amended bill of complaint.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* THE COLTON MARBLE & LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants.	Bill in equity.

To the judges of the circuit court of the United States for the southern district of California:

The United States of America, by the Attorney-General thereof, brings this its second amended bill against the Colton Marble and Lime Company, a corporation organized and existing under and by virtue of the laws of the State of California, O. T. Dyer, W. S. Wilson, and Archibald, each citizens of the State of California; and thereupon your orator shows that the following-described land, situate in San Bernardino County, California, to wit, north ½ section nineteen, township two north, range four west, S. B. M., was acquired by the United States of America from Mexico in 1846 and confirmed by treaty of Gradalupe Hidalgo in 1848, and was then public land of the United States.

Your orator further shows that by the act of Congress approved July
67 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," Congress incorporated the Atlantic and Pacific Railroad Company, and granted to said company a large amount of lands in the State of California and other States and Territories.

It is enacted by said act of Congress as follows:

"SECTION 3. That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munitions of war, and public stores over the route of said line of railway and its branches every alternate section of public land not mineral designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title not reserved, sold, granted, or otherwise appropriated and free from preëmption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of other lands shall be selected by said company in lieu thereof, under the direction of the Secre-
68 tary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; Provided, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

"SEC. 4. That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said telegraph line ready for the service contemplated the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of land as aforesaid shall be issued to said company, confirming to said company the right and title to said land situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company con-
69 veying the additional sections of land as aforesaid, and so on, as fast as every twenty-five miles of said road is completed as aforesaid."

"SEC. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before

or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those granted to said company."

"SEC. 18. That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof to aid in its construction, shall have similar grants of land subject to all the conditions and limitations herein provided, and shall be
70 required to construct its road on the like regulations as to time and manner with the Atlantic and Pacific Railroad herein provided for."

Your orator further shows that said Atlantic and Pacific Railroad Company duly accepted said grant and proceeded to construct said road, and on or about March 12, 1872, did designate the line of said road by a plat thereof, which it filed in the office of the Commissioner of the General Land Office, and all the odd sections of public lands on each side of said road for thirty miles were thereupon withdrawn from market and reserved from sale.

Your orator further shows the court that by section 23 of an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road and for other purposes," it was provided as follows:

"That for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866.

"Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Rail-
71 road Company or any other railroad company."

Said Southern Pacific Railroad Company, which then existed, accepted said grant, and on April 3, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the Commissioner of the General Land Office.

Your orator further shows that by the act of Congress approved July 6, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement and for further purposes," all the lands and rights to lands in California theretofore granted and con-

ferred upon said Atlantic and Pacific Railroad Company were forfeited, resumed, and restored to the public domain for non-completion of that portion of said railroad to have been constructed in California, no part of said road having been constructed in California.

Your orator alleges that on December 2, 1865, a corporation was organized under the laws of the State of California by the name and style of the Southern Pacific Railroad Company, and under a general law thereof, approved May 20, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto, with the corporate name of the Southern Pacific Railroad Company." Said act is printed in the statutes of California, 1861, at page 607, and sections 2, 3, 17 (division first, second, and
72 seventh) 18, 40, and 43 are as follows, to wit:

The people of the State of California, represented in senate and assembly, do enact as follows:

"SECTION 1. ——

"SEC. 2. The said articles of association shall set forth the name of the incorporation, the number of years the same is to continue in existence, which shall not exceed fifty years, the amount of capital stock of the company, which shall be divided into shares of one hundred dollars each, and which shall be the actual contemplated cost of constructing the road, together with the cost of the right of way, motive power, and every other appurtenance and thing for the completion and running of said road, as nearly as can be estimated by competent engineers, the names and number of the directors to manage the affairs of the company, who shall hold their office until others are elected, as shall be provided by the by-laws of the company, the place from and to which the proposed road is to be constructed, and the counties into and through which it is intended to pass, and its length as near as may be. Each subscriber to such articles of association shall personally subscribe thereto his name, place of residence, and the number of shares of stock taken by him in such company; provided, that in case a person desirous of becoming a subscriber, but compelled to be absent from the State at the time of subscribing to such articles of association, he having paid the ten per cent required by law upon his subscription, may sign the same by written proxy, or power of attorney, to that effect; and there shall be endorsed, or attached to the
73 said articles so subscribed an affidavit, made by any three of the directors named therein, setting forth in substance that said amount of stock has been subscribed, and that ten per cent in cash thereon has actually and in good faith been paid in as aforesaid, and that the subscribers to said articles are all known by one or the other of the three directors to be subscribers thereto, and to be the persons so represented."

"SEC. 3. Articles of association formed in pursuance of the provisions of the foregoing sections shall be filed in the office of the secretary of state and thereupon the persons who have or may subscribe the same, and all persons who may, from time to time, become stockholders in such company shall be a body politic and corporate, by the name stated in such articles of association, and shall be capable in law to make all contracts, acquire real and personal property, purchase, hold, convey any and all real and personal property whatever necessary for the construction, completion, and maintenance of such railroad, and for the erection of all necessary

buildings and yards, or places and appurtenances for the use of the same, and be cabable of suing and being sued, and have a common or corporate seal, and make and alter the same at pleasure, and generally to possess all the powers and privileges for the purpose of carrying on the business of the corporation that private individuals and natural persons now enjoy. A copy of any articles of association filed in pursuance of this act, and certified to be a copy by the secretary of state, or his deputy, shall
74 in all courts and places be presumptive evidence of the incorporation of such a company, and of the facts stated therein; and such a copy, so certified, shall be kept in the office of the secretary of the corporation, subject to examination during office hours by any persons.

"SEC. 17. Every railroad corporation shall have power:

"First. To cause such examinations and surveys for the proposed railroad to be made as may be necessary to the selection of the most advantageous route for the railroad, and for such purpose, by their officers, agents, and employees, to enter upon the lands or waters of any person, but subject to responsibility for all damages which they shall do thereto.

"Second. To receive, hold, take, and convey, by deed or otherwise, the same as a natural person might or could do, such vo untary grants and donations of real estate and other property of every description as shall be made to it to aid and encourage the construction, maintenance, and accom'odation of such railroad.

"Seventh. To purchase lands, timber, stone, gravel, or other materials to be used in the construction and maintenance of its road, or take them in the manner provided by this act; may change the line of its road in whole or in part, whenever a majority of the directors shall so determine, as is provided hereinafter; but no such change shall vary the general route of such road as contemplated in the articles of association of such company."

"SEC. 18. If at any time after the location of the line of such railroad, in whole or in part, and the filing of the map thereof, as provided
75 by this act, it shall appear to the directors of such company that the same may be improved, such directors may from time to time alter or change the line in any manner they may think proper, and cause a new map to be filed in the office where the map showing the first location is filed, and may thereupon take possession of the land embraced in such new location that may he required for the construction and maintenance of such new road on such new line, either by agreement with the owner or owners of such lands, or by such proceedings as are authorized under the provisions of this act, and use and enjoy the same in place of the line for which the new is substituted; but nothing in this act shall be so construed as to confer any powers on such companies to so change their road as to avoid any point named in their articles of association, except as provided in section 17, subdivision 17, of this act."

"SEC. 40. It shall be lawful for two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets, and franchises in such manner as may be agreed upon by the board of directors of such companies so desiring to amalgamate and consolidate their interests; but no such amalgamation or consolidation shall take place without the written consent of three-fourths of the value of all stockholders in interest of each company, and no such amalgamation or consolidation shall in any way relieve such companies or the stockholders thereof from any

and all just liabilities; and in case of such amalgamation or consolidation, due notice of the same shall be given by advertising for one month
76 in at least one newspaper in each county, if there shall be one published therein, into or through which such roads shall run, and also for the same length of time in one paper published in Sacramento and two papers published in San Francisco, and when the consolidation and amalgamation is completed, a copy of the new articles of association shall be filed in the office of the secretary of state. It shall be the duty of the railroad company to make and maintain a good and sufficient fence on either or both sides of their property, and in case any company do not make and maintain such fence, if their engine or cars shall kill, maim, or destroy any cattle or other domestic animals when they stray upon their line of road where it passes through or alongside of the property of the owner thereof, they shall pay to the owner or owners of such cattle or other domestic animals a fair market price for the same, unless the owner or owners of the animal or animals so killed, maimed, or destroyed shall be negligent or at fault. In any case where the railroad company have heretofore or may hereafter pay to the owner or owners of the land through which or alongside of which their road is or may be located an agreed price for making and maintaining such fence, or whenever the costs of such fence have been or may be included in the award of damages allowed and paid for the right of way for such railroad, such company shall be entirely relieved and exonerated from all claims or awards of damages arising out of the killing or maiming any animals as aforesaid in favor of all persons, or their successors or assigns, who shall thus fail to construct and
77 maintain such fence. And the owner or owners of such animals shall become responsible to the railroad company for any damage or loss which may accrue to such company from such animals being upon their railroad track by reason of the nonconstruction of such fence by said owner, unless it can be proven that such loss or damage accrued by reason of the negligence of said company, its officers, agents, or employees.

"SEC. 43. Every railroad company in this State shall, within reasonable time after their road shall be finally located, cause to be made a map and profile thereof, and the land taken and obtained for the use thereof, and the boundaries of the several counties through which said road may run and file the same in the office of the secretary of State; and also, like maps of the parts thereof located in different counties, and file the same in the office of the clerk of the county in which said parts of said road shall be, there to remain as of record forever. The said maps and profiles shall be certified by the chief engineer, the acting president, and secretary of such company; and copies of the same so certified and filed as aforesaid, shall be kept in the office of the secretary of the company, subject to examination by all parties interested."

Said corporation was formed for the purpose and with the corporate power, as stated in its articles of incorporation, of constructing, owning, and maintaining a railroad from some point on the Bay of San Francisco, in the State of California, and to pass through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego,
78 to the town of San Diego, in said State; thence eastward, through said county of San Diego, to the eastern line of the State of Cali-

fornia; there to connect with a contemplated railroad from the eastern line of the State of California to the Mississippi River.

Your orator further shows that on October 11th, 1870, under and by virtue solely of the said general laws of the State of California, authorizing two or more railroad companies to consolidate and almalgamate their capital stock, debts, property assets, and franchises, said Southern Pacific Railroad Company, the San Francisco and San José Railroad Company, a railroad corporation then organized and existing under the laws of California, and the Santa Clara and Pajara Valley Railroad Company, also a railroad corporation then organized and existing under the laws of California, did attempt to consolidate and amalgamate their capital stock, debts, property, assets, and franchises, making a different capital, issuing new stock and creating a new and different corporation under the name and style of the Southern Pacific Railroad Company.

Your orator further alleges that on the 12th day of August, 1873, under and by virtue solely of the law of the State of California, of May 20, 1861, before referred to, authorizing the amalgamation and consolidation of two or more railroad companies, the said Southern Pacific Railroad Company pretended to be organized in 1870 as aforesaid, and the Southern Pacific Branch Railroad Company, each organized and then existing railroad companies under and by virtue of the laws of Cali-
79 fornia, did attempt without authority from the United States to amalgamate and consolidate their capital stock, debts, property, assets, and franchises, creating a new capital stock and issuing new certificates of stock and canceling the old ones, and creating a new and different corporation, by the name and style of the Southern Pacific Railroad Company, a copy of which new articles of association and incorporation are hereto attached, marked "Exhibit A. B." and did duly publish and file such new articles as required by law.

And your orator alleges that the Southern Pacific Railroad Company, which was organized and created on August 12, 1873, by the said pretended articles of amalgamation and consolidation of said several railroad companies as heretofore set forth, did construct and complete a railroad from Tehachapa Pass, by way of Los Angeles, to the Colorado River, in the manner and within the time prescribed in said act of Congress in which the Southern Pacific Railroad Company, therein named, was authorized and empowered to do, and thereafter the commissioners appointed under said act for that purpose, did unlawfully make and file their alleged acceptance of the whole of said railroad, and there was not, and is not now, any railroad or part thereof constructed or completed under said act or between said points otherwise than as aforesaid.

Your orator further shows that the general routes of said Atlantic and Pacific Railroad Company and of said Southern Pacific Railroad Company under said act of March 3, 1871, as said routes were located as aforesaid, cross each other in the State of California.

80 That on the south side of said route of the Atlantic and Pacific Railroad Company within 30 miles of said route, but also within 20 miles of the designated route of the Southern Pacific Railroad Company there was not on July 27th, 1866, nor on March 12th, 1872, nor on April 3rd, 1871, and is not now, enough public land in the odd sections to equal

in amount ten (10) alternate sections per mile of the line of road of said Atlantic and Pacific Railroad Company, within such limits, for that prior to said date of July 27, 1866, the Mexican Government and the United States had sold, granted, reserved, and otherwise disposed of so great a quantity of land in those limits.

Your orator further alleges that said lands in said section 19, Twp. 2 north, range 4 west, before described, are situated in San Bernardino County, California, on the south side of the said designated route of the Atlantic & Pacific Railroad Company more than 20 miles, but less than 30 miles therefrom, but are less than 20 miles from said designated route of said Southern Pacific Railroad Company, and in such overlapping limits on the general route of each of said lines of road.

The United States hereby elect to select, hold, and reserve these lands and except the same from any grant to the Southern Pacific Railroad Company as a part of the lands granted to and upon the general line of the route of the Atlantic and Pacific Railroad Company.

Your orator further shows that said lands have never been granted, sold, reserved, occupied by homestead settlers, preëmpted or otherwise disposed of by the United States, or by the Mexican or Spanish Governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein, and are not mineral lands.

81

Your orator alleges that said Southern Pacific Railroad Company, to which corporation said grant was made by said act of Congress of March 3, 1871, did not build or construct any portion of said railroad, and has forfeited all right to such land grant, which forfeiture your orator prays may be established as to these lands in suit therein.

Your orator alleges upon information and belief that the defendants herein have pretended conveyances executed in due form of law from said Southern Pacific Railroad Company, the corporation organized in the year 1870, as aforesaid, to which company said grant of March 3, 1871, was made from said Southern Pacific Railroad Company, organized on August 12, 1873, as aforesaid, purporting to sell and convey to them, the said defendants, the said land described as aforesaid.

Your orator alleges that defendants now claim to own said lands, and deny the plaintiff's right and title thereto, and have been during the past five years, at many and divers times to your orator unknown, and are now, wantonly and unlawfully cutting and destroying the natural timber on said lands without any licence or authority and to the plaintiff's great and irreparable injury. Your orator further shows that there are now on said lands about 2,000 cords of wood which the defendants have unlawfully chopped down from said lands, and that for the past two years the defendants have chopped other wood from said lands unlawfully, and have disposed of the same to divers parties to your orator unknown, and realize, therefrom large sums of money, and defendants are now removing from said lands the wood cut thereon and are threatening to remove all said wood, and unless enjoined will do so, to the great and irreparable injury of the plaintiff.

82

Your orator further shows that the amount in controversy herein exceeds the sum or value of $5,000, exclusive of interest and costs.

In tender consideration whereof, and forasmuch as the plaintiff is remediless at and by strict rules of the common law, and can only be relieved in a court of equity, your orator prays that its title to said lands may be quieted, and that the defendants and each of them be forever enjoined from asserting or claiming any right or title thereto adverse to the plaintiff; and your orator prays that the defenda'ts each and their agents be forever enjoined from cutting any tree or wood upon said land, and from in any way injuring the trees growing thereon, and from removing or causing to be removed from said land any wood or timber now cut thereon or hereafter cut thereon.

Your orator further prays for an accounting from the defendants for all wood sold by them and each of them, and for all the money and profit realized therefrom, and for such other and further relief as the court may deem equitable in the premises.

May it please your honors to grant unto your orator a writ of injunction issuing out of and under the seal of this honorable court, directed
83 to defendants, the Colton Lime & Marble Company, O. T. Dyer, W. S. Wilson, and Archibald, enjoining them and each of them from asserting any right, claim, or title to said lands, and from denying plaintiff's title thereto, and enjoining them each from cutting any tree or wood now on said land, and from removing any wood or timber now cut on said land.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the Colton Lime and Marble Company, O. T. Dyer, W. S. Wilson, and Archibald, commanding them each, on a certain day and under a certain penalty therein to be inserted, to be and appear before your honors and then and there answer the premises and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience, and your orator will ever pray.

JOSEPH H. CALL,
Special Asst. U. S. Attorney, and of Counsel for Plaintiff.
A. W. HUTTON,
United States Attorney.

84 EXHIBIT A. B.

Articles of association, amalgamation, and consolidation, made and executed on this the twelfth day of August, A. D. 1873, by and between the Southern Pacific Railroad Company, of the first part, and the Southern Pacific Branch Railroad Company, of the second part:

Witnesseth: That whereas the said party of the first part heretofore, to wit, on the eleventh day of October, A. D. 1870, was duly incorporated and organized under the laws of the State of California, by the amalgamation and consolidation of the following railroad corporation' theretofore existing under the laws of said State, to wit: The San Francisco and San José Railroad Company, The Santa Clara and Pajaro Valley Railroad Company, the Southern Pacific Railroad Company, and the California Southern Railroad Company, pursuant to articles of amalgamation and consolidation of that date by them agreed upon, which articles were sub-

sequently amended, to wit, on the eleventh day of April, A. D. 1871, by virtue of the laws of said State, whereby said corporation became duly incorporated and organized under the laws of said State for the purpose of purchasing, constructing, owning, and maintaining and operating a continuous line of railroad from the city of San Francisco, in the State of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego to some point on the Colorado River in the southeastern part of the State of California, a distance of seven hundred and twenty miles, as near as may be; also a line of railroad from a point at or near Te-
85 hachapa Pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, a distance of three hundred and twenty-four miles, as near as may be; also a line of rail road from the town of Gilroy, in the county of Santa Clara, in said State, passing through said county and the counties of Santa Cruz and Monterey to a point at or near Salinas City in said last-named county, a distance of forty-five miles, as near as may be; and also such branches to said lines as the board of directors of said corporation may consider advantageous to said corporation and direct to be established;

And whereas the said party of the second part was heretofore, to wit, on the twenty-third day of December, A. D. 1872, duly incorporated and organized under the laws of the State of California for the purpose of purchasing, constructing, owning, maintaining, and operating a railroad from a point on the Southern Pacific Railroad (the railroad of the party of the first part) at or near Salinas City, in the county of Monterey, southeasterly to a point in Kern County south of Tulare Lake, intersecting the San Joaquin Valley division of the said Southern Pacific Railroad; also from a point on the above-described line at or near San Miguel, in San Luis Obispo County, thence in a southerly direction to a point of intersection in Los Angeles County with the line of the said Southern Pacific Railroad running from Tehachapa Pass by way of Los Angeles to Fort Yuma, said road passing into or through the counties of Monterey, San Luis Obispo, Kern, Santa Barbara, and Los Angeles, and said roads, in the aggregate, being as near as may be four hundred and twenty-eight miles in length;

86 And whereas said parties believe a consolidation and amalgamation of their capital stocks, debts, properties, assets, roads, telegraphs, land, and franchises will be mutually advantageous;

And whereas more than three-fourths in value of all the stockholders in interest of each of said parties have consented in writing to such amalgamation and consolidation upon the terms and conditions hereinafter set forth:

Now, therefore, under and by virtue of the statute of the State of California in such cases made and provided, the said parties do hereby mutually covenant and agree, each with the other, to the following articles, to wit:

Article first. Said parties do hereby amalgamate and consolidate themselves into a new corporation, under the name and style of the Southern Pacific Railroad Company, which new corporation shall continue in existence for the period of fifty years from the date of these articles.

And they do further consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights,

titles, privileges, claims, and demands of every kind whatsoever, as well in possession as in expectancy, at law or in equity, and do grant, convey, and vest the same in the said new corporation, as fully as the same are now severally held and enjoyed by them respectively, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, judgments, claims, and charges thereon or in anywise affecting the same or any part thereof.

87 Article second. The object and purpose of said new corporation shall be to purchase, construct, own, maintain, and operate the several lines of railroad hereinbefore described, to wit, a line of railroad from the city of San Francisco, in the State of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego to some point on the Colorado River in the southeastern part of the State of California, a distance of seven hundred and twenty miles, as near as may be; also a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, passing through the counties of Los Angeles, San Bernardino, and San Diego, a distance of three hundred and twenty-four miles, as near as may be; also a line of railroad from the town of Gilroy, in the county of Santa Clara, in the same State, passing through said county and the counties of Santa Cruz and Monterey, to a point at or near Salinas City, in said last-named county, a distance of forty-five miles, as near as may be; also a line of railroad from a point on the line thirdly above described at or near Salinas City, County of Monterey, southeasterly through said county, and into Kern County to a point south of Tulare Lake, in said last-named county, intersecting at said point the line of railroad first above described, a distance of one hundred and eighty miles, as near as may be; also a line of railroad from a point on the last above-described line, at or near San Miguel, in the county of San Luis Obispo; thence in a

88 southerly direction through said county, the county of Santa Barbara, and into the county of Los Angeles, to a point of intersection with the line of railroad secondly above described, to wit, the line from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, a distance of two hundred and forty miles, as near as may be; making in all fifteen hundred and nine miles, as near as may be, and such branches to said lines as the board of directors of said new corporation may hereafter from time to time establish.

Article third. The board of directors of said new corporation shall consist of seven persons, and the following-named persons shall act as such directors until their successors shall have been duly elected pursuant to the by-laws of said new corporation, hereafter to be adopted, viz: C. P. Huntington, D. D. Colton, Robert Robinson, Charles Mayne, S. T. Gage, E. N. Miller, jr., and J. L. Willcutt.

Article fourth. The capital stock of said new corporation shall be ninety million dollars, divided into nine hundred thousand shares of one hundred dollars each, that sum being the contemplated actual cost of said railroads, including telegraph lines, rolling stock, motive power, shops, depots, &c.

Article fifth. Each stockholder of each said parties shall have the same number of shares of the capital stock of the new corporation which he

now owns and holds of the capital stock of his respective company, upon the same terms and conditions, and shall be entitled to receive from said new corporation certificates therefor, where the same has been
89 fully paid up, upon the surrender of the certificates now held by him, and where the same has not been fully paid up he shall receive such other evidence of his ownership as the board of directors of said new corporation shall direct upon the surrender of such evidence of his ownership of such unpaid stock as he may now hold.

Article sixth. And the said several parties of the first and second parts, each for itself, hereby sell, assigns, transfers, grants, bargains, releases, and conveys to the said new and consolidated company and corporation, its successors and assigns, forever all its property, real, personal, and mixed, of every kind and description, all its capital stock, all its interest in the shares of its capital stock subscribed but not fully paid for; all credits, effects, judgments, decrees, contracts, agreements, claims, dues, and demands of every kind and description, and all rights, privileges, and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity, subject, however, to all conditions, obligation, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims, and charges thereon or in anywise effecting the same.

Article seventh. The said new and consolidated company and corporation is to be liable for, and shall fulfil, perform, do, and pay all and each of the contracts and agreements, covenants, duties, obligations, liabilities, debts, dues, and demands of the said several parties of the
90 first and second parts, but his amalgamation and consolidation shall not in anyway relieve the said parties of the first and second parts, or the stockholders thereof, from any and all just liabilities.

In testimony whereof, the said party of the first has caused this instrument to be signed by its vice-president (the president being absent) and its secretary, and its corporate seal to be thereunto affixed, and the said party of the second part has caused this instrument to be signed by its president and secretary and its corporate seal thereunto affixed, in pursuance of orders and resolutions of their several boards of directors, made on the twelfth day of August, 1873.

[SEAL.] SOUTHERN PACIFIC RAILROAD COMPANY,
By DAVID D. COLTON,
Vice-President.
J. L. WILLCUTT,
Secretary.

[SEAL.] SOUTHERN PACIFIC BRANCH RAILROAD COMPANY,
By B. R. CROCKER,
President.
By E. H. MILLER, JR.,
Secretary.

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of said Southern Pacific Railroad Company, party of the first part, to the foregoing new articles of associationa amalgamating and consolidating, the

said parties of the first and second parts hereby consent to such amalgamation and consolidation and to the said new articles of association this twelfth day of August, A. D. 1873.

91 LELAND STANFORD,
CONTRACT & FINANCE CO.,
Pr. W. E. BROWN, *Sec'y.*

MARK HOPKINS.
ROBERT ROBINSON.
S. T. GAGE.
CHAS. MAYNE.
DAVID D. COLTON.
J. L. WILLCUTT.
E. H. MILLER, JR.

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said Southern Pacific Branch Railroad Company, party of the second part to the foregoing new articles of association, amalgamating and consolidating the said parties of the first part and second parts, hereby consent to such amalgamation and consolidation and to the said new articles of association this twelfth day of August, A. D. 1873.

LELAND STANFORD.
E. H. MILLER, JR.
ALBERT GALLATIN.
MARK HOPKINS.
E. W. HOPKINS.
C. H. CUMMINGS.
B. R. CROCKER.

92 STATE OF CALIFORNIA,
Department of State:

I, W. C. Hendricks, secretary of the State of California, do hereby certify that I have carefully compared the annexed copy of articles of association, amalgamation, and consolidation between the Southern Pacific Railroad Co. and the Southern Pacific Branch Railroad Co. with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof; also, that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of State at office in Sacremento, California, the 5th day of September, A. D. 1889.

[SEAL.] W. C. HENDRICKS,
Secretary of State.
By H. B. DAVIDSON,
Deputy.

(Endorsed:) No. 88. In the circuit court of the United States, 9th cir., s. district of California. The U. S. of America vs. Colton Marble & Lime Co. et al. Second amended bill in equity. Service hereof admitted by copy Nov. 29, 1889, and consent hereby given to file this amended bill. H. C. Rolfe Chapman & Hendrick, solicitor for def'ts. Filed November 29th, 1889. Wm. M. Van Dyke, clerk. Joseph H. Call, counsel for plff.

93 *Answer to 2nd amended bill.*

In the circuit court for the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants. } No. 88.

And now come the defendants in the above-entitled cause, and, for answer to the second amended bill filed herein by the Attorney-General of the United States, and making answer to said bill and to so much thereof as they are advised is material, say:

I.

They admit that the land described in the said second amended bill was acquired by the United States of America from Mexico in 1846, confirmed by the treaty of Guadalupe Hidalgo, in 1848, and that the land was, at the date last aforesaid, public land of the United States.

II.

They admit that an act was passed by the Congress of the United States, and approved July the 27th, 1866, entitled "An act granting lands
94 to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast;" and that, by the said act, there was incorporated the Atlantic & Pacific Railroad Company; and that sections 3, 4, 6, and 18 of said act are correctly set out in the said second amended bill.

III.

They admit that the Atlantic & Pacific Railroad Company accepted the said grant, but upon information and belief the defendants deny that, on about the 12th day of March, 1872, or at any other time, the said Atlantic & Pacific Railroad Company did designate the line of said road by a plat thereof which it filed in the office of the Commissioner of the General Land Office, or in any other manner; or that all or any of the odd sections of public lands on each side of said road for thirty miles, or for any distance, were thereupon withdrawn from market or reserved from sale.

IV.

Defendants admit that by section 23 of the act of Congress approved March the 3rd, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road and for other purposes," it was provided that, for the purpose of connecting the Texas & Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California was thereby authorized, subject

to the laws of California, to construct a line of railroad from a point at or near Tehachipa Pass, by way of Los Angeles, to the Texas & Pacific Railroad at or near the Colorado River, with the same rights,
95 grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to the said Southern Pacific Railroad Company of California by the act of July 27th, 1866, and that it was otherwise provided by the said section as set forth in the said second amended bill; and defendants admit that the said Southern Pacific Railroad Company accepted the said grant, and, on April the 3rd, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the Commissioner of the General Land Office.

V.

Defendants admit that, by the act of Congress approved July 6th, 1886, entitled "An act to forfeit the lands granted to the Atlantic & Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes," all the land and rights to land in California theretofore granted and conferred upon said Atlantic & Pacific Railroad Company were forfeited, resumed and restored to the public domain for noncompletion of that portion of the said railroad to have been constructed in California, no part of said road having been constructed in California.

VI.

Defendants admit that, on the 2nd day of December, 1865, a corporation was organized under the laws of the State of California by the name and style of the Southern Pacific Railroad Company, under a gen-
96 eral law of said State, approved May the 20th, 1861, entitled "An act to provide for the incorporation of railroad companies, and the management of the affairs thereof and other matters relating thereto," with the corporate name of the Southern Pacific Railroad Company; and that the said act is printed in the statutes of California, 1861, at pages 607 et seq.; and defendants admit that sections 2, 3, 17, divisions 1st, 2nd, and 7th, 18, 40, and 43, are as set forth in the said second amended bill; and that the said corporation was formed for the purpose and with the corporate powers stated in its articles of incorporation, and that so much of the said articles as state the purpose of the corporation is correctly set forth in the said second amended bill.

VIII.

Defendants deny that the Atlantic & Pacific Railroad Company, by or through the filing of any maps designating the line of its route or the location thereof, or by any other means, ever acquired any right to any lands of the United States in the State of California lying opposite to the lines of route marked on said or any maps, or any other lands in said State; and denies that the said company ever acquired the right to select any of the public lands along any route or line in the State of California as other lands in lieu of sections within twenty miles of any line located

or designated by said company that had been granted, sold, reserved, occupied by homestead settlers or preëmptors, or otherwise disposed of by the United States, or in lieu of any lands whatever.

97

VIII.

Defendants aver that the grant of land by the said act of Congress of July the 27th, 1866, and hereinbefore referred to, was made to aid in the construction of a railroad beginning at or near the town of Springfield, in the State of Missouri, and thence to the western boundary line of said State; and thence, by the most eligible railroad route, as should be determined by said company, to a point on the Canadian River; thence to the town of Albuquerque, on the River del Norte; and thence, by the way of Agua Frio, or other suitable pass, to the head waters of the Colorado Chiquito; and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railroad route, to the Colorado River, at such point as might be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific; and it was by the said act further provided, in section 18 thereof, that the Southern Pacific Railroad, a company incorporated under the laws of the State of California, was thereby authorized to connect with the said Atlantic & Pacific Railroad, formed under the said act, at such point near the boundary line of the State of California as they should deem most suitable for a railroad line to San Francisco; and should have a uniform gauge and rate of freight and fare with said road; and in consideration thereof to aid in its construction should have similar grants of land, subject to all the conditions and limitations therein provided, and should be required to

98

construct its road on the like regulations as to time and manner with the Atlantic & Pacific Railroad therein provided for; and defendants further aver that, by the terms of the said act, the construction of a railroad from the Colorado River to San Francisco was expressly granted and given to the said Southern Pacific Railroad Company, and upon information and belief they aver that the said Atlantic & Pacific Railroad Company was never authorized to construct any such line of railroad, or to acquire any lands by reason of or in respect of the construction or proposed construction of any such line from the Colorado River to the city of San Francisco.

IX.

These defendants aver that the lands involved in this suit had, on the 3rd of April, 1871, by the filing of the map of definite location of the Southern Pacific Railroad, been duly reserved from sale by and under the 23rd section of the act of Congress of March the 3rd, 1871, and the sixth section of the act of Congress of July the 27th, 1866, which said sections are set out in full in the second amended bill of complaint herein; and they aver that the said lands have been duly withdrawn from market and appropriated for the use of the said defendant, the Southern Pacific Railroad Company, by the order of the Commissioner of the General Land Office to the register and receiver of the United States land office at Los Angeles, duly issued April the 21st, 1871.

X.

99 Answering the allegations in the plaintiff's said second amended bill, that the Southern Pacific Railroad Company, one of the defendants herein, is not the same Southern Pacific Railroad Company which was organized and incorporated under articles of amalgamation and consolidation, dated October 11th, 1870, and amended April 11th, 1871, as in said second amended bill set forth, these defendants allege that the said Southern Pacific Railroad Company is the same company, and that the changes and amendments made from time to time in its articles of organization have been made in accordance with the laws of the State of California; and defendants further aver that it is the same Southern Pacific Railroad Company that is mentioned in the act of Congress of the 25th of June, 1868, 15th volume of Statutes at Large, page 79, and in the act of the 25th of July, 1868, 15th volume of Statutes, page 187, and in the joint resolution of Congress of June the 28th, 1870, the 10th volume of the United States Statutes, page 382, and in the 23rd section of the act of March the 3rd, 1871, 16th United States Statutes, page 579; which said 23rd section is as follows: "Section 23. That, for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California are hereby authorized, subject to the laws of California, to construct a line of railroad from a point at or near the Tehachipa Pass, by the way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and con-
100 ditions as were granted to said Southern Pacific Railroad Company of California by the act of July the 27th, 1866. *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." And defendants aver that, on the 3rd day of April, 1871, the said Southern Pacific Railroad Company designated the line of its said road, as described in said section 23, by a map thereof, filed in the office of the Commissioner of the General Land Office, and thereupon the said commissioner ordered all the public lands in odd sections within thirty miles of such route to be withdrawn from market. These defendants aver that the said Southern Pacific Railroad Company is the same railroad company that constructed the railroad provided for in the said 23rd section of said act of Congress of March the 3rd, 1871, and that it fully constructed and completed its road according to the said act, and the construction thereof has been accepted and approved by the President of the United States as having been constructed by the said Southern Pacific Railroad Company, to which the said grant was made, the construction of the last miles of said road having been accepted by President Hayes on the 23rd of January, 1878. And the defendants deny that the commissioners appointed for that purpose did unlawfully make or file their alleged acceptance of the whole of said railroad by sections. And defendants further aver that the said Southern Pacific Railroad Company, one of the defendants herein, since the amalgamation and consolidation thereof as set forth in the
101 said second amended bill, has been, by all Departments of the Government of the United States, recognized and accepted as said Southern Pacific Railroad Company mentioned and referred to in the said

several acts of Congress of 1866 and 1871, and all other acts referred to in the said second amended bill filed herein, and is entitled to all the rights and privileges, and subject to all the duties, liabilities, and burdens granted to or imposed upon the said Southern Pacific Railroad by the said acts of Congress, and each and all of them; and the said reports of the commissioners accepting the said road constructed by the said Southern Pacific Railroad Company, one of the defendants herein, were accepted by the Secretary of the Interior and the President of the United States; and the said action of the Secretary and President is binding upon the United States, and its validity cannot be called in question in this action.

XI.

The defendants, on information and belief, deny that on the south side of any route of the Atlantic & Pacific Railroad Company in the State of California, within thirty miles of said route, there was not, on July the 27th, 1866, or March the 12th, 1872, or April the 3rd, 1871, or that there is not now enough public land in the odd sections to equal in amount ten alternate sections to a mile of any line of road of said Atlantic & Pacific Railroad Company; nor had the Mexican Government and the Government of the United States sold, granted, reserved, or otherwise disposed of so great a quantity of land in those limits as not to leave
102 sufficient to equal the said amount. Defendants deny that the land mentioned and described in the said second amended bill, to wit: The north half of section 19, township 2 north, range 4 west, S. B. M., lies within the overlapping limits on the general route of the lines of road of the Atlantic & Pacific Railroad Company and the Southern Pacific Railroad Company, or that the United States have any right to select, hold, or reserve the said land, or except the same from the grant of the Southern Pacific Railroad Company, either as a part of the lands granted to or upon the general line of the route of the Atlantic & Pacific Railroad Company, or for any other reason or any other purpose. And defendants deny that the said lands have never been granted by the United States Government, in whole or in part, but avers that they have been granted to the Southern Pacific Railroad Company by the acts aforesaid. And defendants deny that the said Southern Pacific Railroad Company, to which the said grant was made by the act of Congress of March the 3rd, 1871, did not build or construct any portion of the said railroad; but avers that it has fully completed the construction of said railroad; and deny that it has forfeited *a* all or any right to such land grant.

XII.

Defendants admit that the defendants herein, other than the said Southern Pacific Railroad Company, have conveyances executed by the said Southern Pacific Railroad Company to them, purporting to sell and convey to them the said lands, and that they now claim to own and
103 hold the said lands and deny the plaintiff's right and title thereto, but deny that they are now, or ever have been, wantonly or unlawfully cutting or destroying *m*atural timber on said land without any license or authority, or to plaintiff's great or irreparable injury. They admit that they have cut about cords of wood upon the said land within the

past two years, and that said wood so cut by them and used and appropriated to their own use, is of the value of dollars; but the defendants aver that they are the owners of the said land and have the right to cut the said wood and take the same and appropriate it to their own use, and that the plaintiff has not any right, title, or interest in or to the said land or to the timber growing thereon.

And defendants deny that any other matter, cause, or thing, in the plaintiff's said second amended bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

H. C. ROLFE AND CHAPMAN & HENDRICK,
Solicitors for Defendants.
J. D. REDDING, *of Counsel.*

104 UNITED STATES OF AMERICA,
District of Southern California, ss:

I, being duly sworn, depose and say that I am the of the Colton Marble and Lime Company, one of the defendants in the above cause; that I have read the foregoing answer and know the contents thereof, and the same is true as I verily believe.

Subscribed and sworn to before me, this day of 1890.

(Endorsed:) No. 88. In the United States circuit court, ninth circuit, southern district of California. The United States of America, plaintiff, vs. The Colton Marble and Lime Co., O. T. Dyer et al., defendants. Answer. Filed February 3rd, 1890. Wm. M. Van Dyke, clerk. Received copy Feb'y 3d, 1890. J. H. Call, spec. asst. U. S. atty. Longley Bros, reporters and typewriters, tel. 722, Los Angeles, Cal.

105 *Replication.*

In the circuit court of the United States, southern district of California.

THE UNITED STATES OF AMERICA,
vs.
THE COLTON MARBLE AND LIME COMPANY, C. T. Dyer, Archibald and W. S. Wilson. } Number 88. Replication.

This repliant saving and reserving to himself ever and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answers of said defendants, and each of them severally for replication thereunto, says that he will aver. maintain, and prove his bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answers of said defendants and each are uncertain, untrue, and insufficient, to be

replied unto by the repliant without this; that any other matter or thing whatsoever in said answers contained, material or effectual, to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

JOSEPH H. CALL,
Special Assistant United States Attorney,
and of Counsel for Plaintiff.

106 (Endorsed:) No. 88. In U. S. circuit court, southern district of California. U. S. of America vs. Colton Marble and Lime Company et al. Replication. Filed February 3rd, 1890. Wm. M. Van Dyke, clerk. Service hereof admitted by defts. by copy Feb'y 3, 1890. H. C. Rolfe & Chapman & Hendrick, sol. for defendants. J. H. Call, sol. for plff.

107 *Enrollment.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, COMPLAINANTS,
vs.
THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants. } No. 88.

The complainants filed their bill of complaint herein on the 15th day of October, 1888, which is hereto annexed.

On the 17th day of October, 1888, the complainants filed their amendment to their bill of complaint herein, which is hereto annexed.

A subpœna to appear and answer the said bill of complaint as amended was thereupon, on the 17th day of October, 1888, issued, returnable on the 3rd day of December, 1888, and is hereto annexed.

On the 1st day of December, 1888, the complainants filed their amendment to their bill of complaint herein, which is hereto annexed.

The defendants appeared herein on the 3rd day of December, 1888, by H. C. Rolfe, esq., Joseph D. Redding, esq., and Messrs. Chapman and Hendrick, their solicitors.

108 On the 4th day of January, 1889, the demurrer of the defendants to the bill of complaint of complainants was filed herein, and is hereto annexed.

On the 14th day of January, 1889, the complainants filed their amendment to their bill of complaint herein, which is hereto annexed.

On the 27th day of May, 1889, the court made and entered an order herein, overruling the demurrer of the defendants to the amended bill of complaint of the complainants herein, a copy of which order is hereto annexed.

On the 29th day of August, 1889, the answer of the defendants to the bill in equity of the complainants as amended was filed herein, and is hereto annexed.

On the 14th day of October, 1889, the amended bill of complaint of the complainants was filed herein, and is hereto annexed.

On the 21st day of October, 1889, the amendment to the amended bill of complaint of complainants was filed herein, and is hereto annexed.

On the 29th day of November, 1889, the second amended bill of complaint of the said complainants was filed herein, and is hereto annexed.

On the 3rd day of February, 1890, the answer of the defendants to the second amended bill of complaint of said complainants was filed herein, and is hereto annexed.

On the 3rd day of February, 1890, the replication of the complainants to the answer of defendants was filed herein, and is hereto annexed.

109 Testimony was thereafter taken by the respective parties and filed in the clerk's office of the said circuit court.

On the 22nd day of March, 1890, being a day in the January term, A. D. 1890, of the said circuit court, present the honorable Lorenzo Sawyer, circuit judge, and the honorable Erskine M. Ross, district judge, the hearing of said cause before the court was had upon the pleadings and proofs, and on said 22nd day of March, 1890, said cause was argued by counsel and was submitted to the court for its consideration and decision upon said argument and upon briefs to be thereafter filed on behalf of the respective parties by counsel.

On the 10th day of September, 1890, the court made and entered an order herein in the words and figures following, to wit: "On the application of Joseph H. Call, esq., special assistant United States attorney, it is ordered by the court that the complainant may withdraw all objections made and entered on behalf of the complainant to stipulated evidence and to documentary evidence in the above-entitled cause, showing or tending to show that the line of railroad between Tehachapi Pass and the Colorado River, via Los Angeles, was constructed between August 12th, 1873, and January 1st, 1880, and such objections are considered by the court as having been withdrawn; and it is further ordered by the court, in open court, that the said cause be now finally submitted for the decision of this court."

110 On the 6th day of March, 1891, the court made and entered an order herein that the complainants' second amended bill of complaint be dismissed.

On the 6th day of March, 1891, a final decree dismissing the said second amended bill of complaint, in accordance with the terms of said order, was signed, filed, entered, and recorded herein and is hereto annexed.

111 *Final decree.*

United States of America. Circuit court of the United States, ninth judicial circuit, southern district of California. In equity.

THE UNITED STATES OF AMERICA, complainants,
vs.
THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson, defendants. } Decree.

This cause having heretofore been brought to a hearing upon the pleadings and proofs, and having been argued by Joseph H. Call, esq., special

assistant United States attorney for the southern district of California, of counsel for the said complainants, and by Joseph D. Redding, esq., the counsel for the said defendants, and having thereupon been submitted to the court for its consideration and decision, and the court, after due deliberation thereon, having ordered that the complainants' second amended bill of complaint herein be dismissed.

It is therefore ordered, adjudged, and decreed, that the said
112 second amended bill of complaint of the said complainants, the United States of America, be and be same is hereby dismissed.

Los Angeles, March 6th, 1891.

Ross,
District Judge.

Decree entered and recorded March 6th, 1891.
WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No 88. U. S. circuit court, southern district California. United States of America, complainants, vs. The Colton Marble and Lime Company et al., defendants. Final decree filed March 6th, 1891. Wm. M. Van Dyke, clerk.

113 *Clerk's certificate to enrolled papers.*

Whereupon, said bill of complaint, amended to bill of complaint, subpœna, amendment to bill of complaint, demurrer to bill of complaint, amendment to bill of complaint, copy of order overruling demurrer, answer to bill of complaint as amended, amended bill of complaint, amendment to amended bill of complaint, second amended bill of complaint, answer to second amended bill of complaint, replication, and final decree are hereto annexed; said final decree being duly signed, filed, and enrolled, pursuant to the practice of said circuit court.

Attest, etc.,
[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 88. In the circuit court of the United States, ninth judicial circuit, for the southern district of California. The United States of America vs. the Colton Marble and Lime Company et al. Enrolled papers. Filed March 6th, 1891, Wm. M. Van Dyke, clerk. Recorded decree register book No. 1, page 46.

114 *Opinion on demurrer.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA,
v.
THE SOUTHERN PACIFIC RAILROAD CO. ET ALS.

By the bill filed in this case the United States seek to annul certain patents issued by them to the Southern Pacific Railroad Company on March 29, 1876, April 4, 1879, and December 27, 1883, respectively, for

lands situated in Los Angeles County, California, and to quiet plaintiffs' alleged title thereto. To the bill as amended demurrers have been interposed which raise the question of the sufficiency of the matters alleged to entitle the plaintiffs to the relief sought.

The allegations, in substance, are that Congress, by an act approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," granted to the Atlantic and Pacific Railroad Company for the purpose of aiding in the construction of said railroad, etc., "every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United
115 States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or preëmpted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers; provided that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act;" that by section 4 of the same act it is provided that whenever said Atlantic and Pacific Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of the road and telegraph line have been completed as required by the act, the commissioners
116 shall so report to the President, and patents shall be issued to said company confirming thereto "the right and title to said land situated opposite to and coterminous with said completed section of said road," and that from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, upon like report, patents shall be issued conveying to the company additional sections of the land; that by section 6 of the act it is provided that the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, "and the odd sections of land hereby granted shall not be liable to sale or entry or preëmption before or after they are surveyed except by said company, as provided in this act;" that by section 18 of the same act the Southern Pacific Railroad Company was authorized to connect with the said Atlantic and Pacific Railroad at such point near the boundary line of the State of California as they should deem most suitable for a railroad line

to San Francisco, and was required to have a uniform gauge and rate of freight and fare with the Atlantic and Pacific road, and was given similar grants of land, subject to all the conditions and limitations provided in the act, and was required to construct its road on the like regulations as to time and manner as provided in respect to the Atlantic and Pacific road.

It is alleged that the Atlantic and Pacific Company duly accepted the said grant and proceeded to construct its road, and on or about
117 March 12, 1872, did designate the line of said road by a plat thereof filed in the office of the Commissioner of the General Land Office, and that all the odd sections on each side of said road for thirty miles were thereupon withdrawn from market and reserved from sale.

The bill, as amended, further alleges that by section 23 of an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road and for other purposes," it was provided as follows:

"That for the purpose of connecting the Texas and Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company by the act of July 27, 1866: Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

The bill, as amended, alleges that the Southern Pacific Company accepted this grant and on April 3, 1871, did designat the line of its said road by a plat thereof which it on that day filed in the office of the Commissioner of the General Land Office, and did construct and complete the same in the manner and within the time prescribed, except that it
118 did not connect with the Texas and Pacific Railroad. It is averred that on or about March 29, 1876, April 4, 1879, and December 27, 1883, respectively, the Commissioner of the General Land Office, without any authority of law therefor, caused certain patents to be signed by the President and by the recorder of the General Land Office, and issued the same to the Southern Pacific Railroad Company for certain lands situated in the county of Los Angeles, State of California, in odd-numbered sections, within ten miles of the route of the road of said Southern Pacific Company, as shown by its designated route of location filed in the office of the Commissioner of the General Land Office, pursuant to said act of Congress of March 3, 1871, and which said lands are also within thirty miles of, but more than twenty miles from, the line of road of the said Atlantic and Pacific Railroad Company, as designated by its plat filed in the office of the Commissioner of the General Land Office, pursuant to the act of July 27, 1866. The amended bill also avers "that, at the time the route of location of said Atlantic and Pacific Railroad was filed on March 12, 1872, there was, within the twenty mile or primary limits of said road, situated opposite to the tracts described in said pretended patents, a large amount of land which had previous to that time been granted, sold, reserved, and otherwise appropriated, which amounted to more in the ag-

gregate than the amount of the lands described in said pretended patents, but no indemnity land has been selected in lieu thereof by the Government or said railroad company," and that the lands described in the pat-
119 ents have at all times been "agricultural lands and of greater value than other lands in the indemnity limits of said Atlantic and Pacific Railroad Company," and "have never been granted, sold, reserved, occupied by homestead settlers, preëmpted, or ortherwise disposed of by the United States, or by the Mexican or Spanish governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein."

It is further averred that on or about March 27, 1837, Ignacio Palomares and Ricardo Vejar presented a petition to Juan B. Alvarado, then governor of Upper California under the Mexican Government, for a grant of the place known by the name of San José. That thereupon, after investigation, such grant was on April 15, 1837, duly made by Governor Alvarado to said Palomares and Vejar of the place called San José, in conformity with the plat attached to the petition and within the boundaries therein expressed. That thereafter, and on or about December 16, 1839, one Louis Arenas and said Ignacio Palomares and Ricardo Vejar presented their petition to the prefect of the district for a grant for the land called San José, ceded by the decree of April 15, 1837, and one additional league of grazing land. That subsequently, to wit, March 14, 1840, the then governor of the department of the Californias granted the land so petitioned for to said Areñas, Palomares, and Vejar, and that thereafter said grant was duly approved by the departmental assembly and juridical possession of said land given to the said grantees. That in or about September, 1852, Henry Dalton, Ignacio Palomares, and Ricardo Vejar each severally filed his claim for confirmation of one-
120 third of the place called San José, granted as aforesaid, with the board of land commissioners, pursuant to the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," and thereafter and on or about January 31, 1854, the said board rendered and entered its three several decrees confirming to each of said claimants the land applied for. That on appeal to the district court, that court at its December term, 1854, rendered its decree in each case affirming that of the board of land commissioners, confirming to Dalton, Palomares, and Vejar an equal undivided one-third each "of the lands of San José granted by Juan B. Alvarado, governor of California, to Ignacio Palomares and Ricardo Vejar on April 15, 1837, and regranted by said governor on March 14, 1840, to said Palomares and Vejar and to Louis Arenas, as described in the grant first mentioned and the map to which the same refers, and which boundaries fully appear from the act of juridical possession," described substantially as follows: "Commencing at the foot of a black walnut tree, thence westerly 9,700 varas to the foot of hills called Las Lomas de la Puente to a large walnut tree on the slope of a small hill on the side of the road which passes from San José to Puente; thence northerly 10,400 varas to the creek (arroyo) San José, opposite a high hill at a large oak; thence easterly 10,600 varas to the arroyo San Antonio to two young cottonwood trees; thence southerly 9,700 varas to the place of beginning," from which decree there

was no appeal and the same became final. That under the direction
121 and on behalf of the United States surveyor-general for California, one George H. Thompson, deputy United States surveyor, did, in August, 1868, so survey and locate the said grant as to include as a part thereof all the lands described in the patents in question, and thereafter, and in the same year, such survey was duly approved by said surveyor-general, and the same was then spread upon the records of the General Land Office and of the office of said surveyor-general. That subsequent to May 1, 1871, the said surveyor-general made another survey of said San José grant upon which the United States did, on January 20, 1875, issue its patent to said Dalton, Vejar, and Palomares, which patent was duly accepted by said claimants, and which said patent and final survey did not include any of the lands described in the patents in question, but that all the said lands "were claimed and occupied by said Henry Dalton, Ignacio Palomares, and Ricardo Vejar, their heirs and assigns, as a part of said San José grant, as petitioned for, granted and confirmed, located and surveyed, from August, 1868, till March 1, 1872."

The bill, as amended, also alleges that by the act of Congress approved April 6, 1886, entitled "An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes," all the lands and rights to lands in California theretofore granted and conferred upon said Atlantic and Pacific Railroad Company were forfeited, resumed, and restored to entry for noncompletion of
122 that portion of said railroad to have been constructed in California.

By an amendment to the amended bill it is alleged that the plaintiffs have elected and do elect "to hold, select, reserve, and set apart all the lands in suit herein as a part of said twenty sections per mile granted to said Atlantic and Pacific Railroad Company by said act of Congress of July 27, 1866, and which were deducted and excluded from said grant to said Southern Pacific Railroad Company on account of said grant to said Atlantic and Pacific Railroad Company and also on account of said San José Rancho and the location, claims, and survey thereof;" and further, "that the route of the Southern Pacific Railroad Company, as designated by the plat thereof filed in the office of the Commissioner of the General Land Office as aforesaid, and as located and constructed is, and it was necessary that it should be, upon the same general line as that of the said Atlantic and Pacific Railroad Company, as designated by the plat thereof filed by said company as aforesaid, and all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, and are upon the same side of the designated route of the Atlantic and Pacific Railroad Company as the lands for which that company had a right to select indemnity or lieu for prior to July 6, 1886, and which right since that time has been in the United States."

Allegations are also made as to the value of the lands in controversy, and in respect to the claims of the defendants thereto. Three other cases, entitled, respectively, United States v. Southern Pacific R. R. Co.
123 et als., No. 67; United States v. Southern Pacific R. R. Co. et als. No. 69, and the United States v. The Colton Marble & Lime

Co. et als., No. 88, were submitted at the same time as the present case and upon the same arguments, and as they involve substantially the same question, what is here said will apply to them as well.

While in these cases but a comparatively small amount of land is involved, the suits, it seems from a decision of the Secretary of the Interior rendered June 23, 1888, and reported in Vol. 6, of the Land Decisions, pg. 816, were instituted by the Government to test its right to a large amount of land similarly situated. That decision was made upon an application on the part of the Southern Pacific Railroad Company that it be called on, under the act of Congress of March 3, 1887, for a reconveyance of the lands which were held by the Land Department to have been improperly patented to said company, so that upon a refusal to reconvey suits might be brought by the Government to set aside such patents, and that no further patents should be issued to said company for lands in the limits of the forfeited grant to the Atlantic and Pacific Railroad Company; and also that the then subsisting withdrawal of lands within the primary grant limit of the Southern Pacific Railroad (branch line) which are also within the granted and indemnity limits of the Atlantic and Pacific Railroad should remain undisturbed until the rights of the Southern Pacific Company could be determined by suits before the courts. The Secretary, in deciding upon the application, after dividing the lands covered by the grants into three classes, to wit:

124 1. Lands within the common primary limits of the grant to the Atlantic and Pacific Railroad Company and of the grant to the Southern Pacific Railroad Company (branch line).

2. Lands within the primary limits of the grant to the Southern Pacific Railroad Company (branch line) and within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company.

3. Lands within the indemnity limits of the grant to the Southern Pacific Railroad Company (branch line) and within the primary limits of the grant to the Atlantic and Pacific Railroad Company, held that as to the lands embraced in the first class as thus divided for which patents had been issued to the Southern Pacific Railroad Company suits should be brought to annul them and that all pending selections of similar lands be canceled and other unpatented lands within said limits be restored to settlement and entry; and that the request of the railroad company that such lands be held in reservation until the rights of the company thereto could be determined by the courts be denied—the Secretary basing his conclusions in that regard upon the decisions of the Supreme Court in the cases of the Missouri, Kansas and Texas Ry. Co. v. Kansas Pacific Ry. Co. (97 U. S. 491, and the St. Paul and Sioux City R. R. Co. v. Winona and St. Paul R. R. Co., 112 U. S. 720.)

In respect to the lands embraced in the third class the Secretary authorized the institution of like proceedings upon the authority of the Supreme

125 Court in cases of the Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fé R. R. Co. (112 U. S., 414 and Sioux City & St. Paul R R. Co. v. Chicago Milwaukee & St. Paul R. R. Co. 117 U. S. 406).

In respect to those embraced in the second class, while expressing a doubt whether the reservation of "prospective rights" (of the Atlantic and Pacific Railroad Company) prevented the attachment of the grant of

the Southern Pacific Company to lands in place, he did not feel disposed to disturb the ruling made by the Department in the cases of Gordon v. Southern Pacific R. R. Co. (5 L. D., 691), of Coble (6 L. D., 679 and 812) and of Voss, decided December 10, 1887, in which cases it was held that lands within the indemnity limits of the Atlantic and Pacific Railroad Company were excepted from the operation of the grant to the Southern Pacific Company by the proviso to the twenty-third section of the act of March 3, 1871, although said lands fell within the granted limits of the Southern Pacific Railroad, because the Atlantic and Pacific Company had a prospective right of selection of said lands wherever its grant should be located. But in view of the doubt expressed, the Secretary concurred in the recommendation of the Commissioner of the General Land Office, that the unpatented lands of this class be continued in reservation pending adjudication by the courts, or until such time as the Department should deem it proper to remove the reservation.

The views of the Department in the Gordon, Coble and Voss cases were the same as those of the Assistant Attorney-General in the case of the Texas Pacific Railroad Company v. Southern Pacific R. R.
126 Co. (4 L. D., 215) and were also in accord with those of Attorney-General Garland given in response to a question submitted to him by the Secretary of the Interior, 6 L. D., 814. The act of July 27, 1866, unlike almost all other grants of land made by Congress to aid in the construction of railroads, does not in terms fix a lateral limit within which the land granted is to be taken, but reading sections 3 and 4 of the act together and remembering what must never be forgotten in the construction of such grants, that the act is a law as well as a grant, and that effect must be given to the attention of Congress in making it, I think a lateral limit of twenty miles is in effect fixed within which the lands granted are to be taken, with a provision for the selection of indemnity lands, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the sections embraced in the primary grant. Taking section 3 of the act alone, the grant to the Atlantic and Pacific Company would be precisely like that made by the nineteenth section of the act of July 2, 1864 (13 U. S. Stat., 364), to the Burlington and Missouri River Railroad Company, which was under consideration in the case of the United States v. Burlington, etc., R. R. Co., 98 U. S., 359. The grant there was of every alternate section of public land (excepting mineral land) designated by odd numbers, to the amount of ten alternate sections per mile on each side of the road, on the line thereof, which were not sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed; and one of the positions taken by the
127 Government in that case was that the grant to the company was only of land situated within twenty miles of the road, but the court held that the position found no support in the language of the act of Congress, which simply declared that a grant is made of land to the amount of ten sections per mile on each side of the road. "The grant is one of quantity," said the court, "and the selection of the land is subject only to these limitations: 1st, that the land must be embraced by the odd sections; 2d, that it must be taken in equal quantities on each side of the road; 3d, that it must be on the line of the road, and 4th, that it must not

have been sold, reserved, or otherwise disposed of by the United States, and a preëmption or homestead claim must not have attached to it at the time the line of the road was definitely fixed." In the grant to the Burlington and Missouri River Railroad Company no indemnity was provided for, as is done by the act of July 27, 1866, and the act making the grant to that company, in providing for the issuance of patents for the lands as the sections of road should be completed, did not provide, as does the act of July 27, 1866, for the issuance of such patents confirming to the grantee "the right and title to said land situated opposite to and coterminous with said completed section of said road," but the provision there was that such "patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid." (13 U. S. Stats., 365.) And in the course of the opinion (98 U. S., p. 340) the court laid stress upon the fact that the terms of the grant did not require the
128 land to be contiguous to the road, and if not contiguous, said the court, it is not easy to say at what distance the land to be selected would cease to be along its line. Nor is it without force that in the grant to the Burlington Company no provision was made for the selection of indemnity lands. Being simply a grant of quantity, without any limitation as to the distance from the road the land should be taken, there was no need for such a provision. In the act of July 27, 1866, however, not only is there a provision for the selection of land within extended limits to make up any deficiency arising from the disposition or a portion of the granted land between the date of the act and the location of the road, of which there would have been no need had the grant been intended as one only of quantity, but, as has been seen, the provision contained in section 4 of the act for the issuance of patents as the sections of road should be completed refers to the land granted as being situated opposite to and coterminous with such completed sections. These considerations, it seems to me, justify the conclusion that the act of July 27, 1866, in effect although not in terms, fixes a lateral limit of twenty miles on each side of the road within which every alternate section of public land designated by odd numbers is granted with a provision for the selection of indemnity lands within an extended limit of ten miles; and, although the point does not appear to have been made in any of the cases in which the act of July 27, 1866, was under consideration, the construction above adopted is that which has uniformly been taken by the courts, the Land Department, and by the only one
129 of the railroad companies that complied with the conditions of the grant and earned the granted lands.

As appears from the bill, the lands in controversy here are situated along and within twenty miles of the line of the road of the Southern Pacific Railroad Company as designated by its plat filed April 3, 1871, and as thereafter actually constructed, and more than twenty miles from but within thirty miles of the route of the Atlantic and Pacific Company, as designated by its plat filed March 12, 1872. Had they been situated within twenty miles of the designated route of the Atlantic and Pacific Company they would clearly have fallen within the grant to that company, and consequently have been excluded from the subsequent grant to the Southern Pacific Company; for, if the construction above put upon the act of July 27, 1866, be the correct one, every alternate section of public land desig-

nated by odd numbers within twenty miles of the line of the road as definitely fixed would have passed to the Atlantic and Pacific Company as of the date of its grant. (St. Paul Railroad Co. v. Winona Railroad Company, 112 U. S., 726; Sioux City R. R. Co. v. Chicago Railway Co., 117 U. S., 408, and cases there cited.) It is contended by the Government that all public lands, designated by odd numbers and embraced within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company are also excepted from the grant to the Southern Pacific Railway Company by reason of the proviso to the 23d section of the act of March 3, 1871, which, as has been seen, reads: "Provided, however, That this section shall in no way affect or impair the rights, present and pros-
130 pective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

The reason why, in grants in which a limit is prescribed, and all the alternate odd or even sections within the limit are granted, title to such sections attaches as of the date of the grant and why, to lands embraced within the indemnity or lieu limits, no title attached, prior to selection, is, that in the one case the land granted becomes ascertained, and consequently the title thereto fixed and perfected by the location of the line of the road, whereas, in the other case, there are no means known to the law by which the lands embraced in the grant can be ascertained prior to their selection (authorities supra). To lands to which no title could attach prior to selection I do not think the Atlantic and Pacific Company had, at the time of the grant to the Southern Pacific Company, a present or prospective right. If it had such right to the particular lands in suit, it had the same right to all other lands to which the right of selection might have applied. And since by the act making the grant the Atlantic and Pacific Company was empowered to construct its road along the thirty-fifth parallel of latitude to the Colorado River "at such point as may be selected by said company for crossing, thence by the most practicable and eligible route to the Pacific" Ocean the present and prospective right of that company, prior to selection, might be applied to any public land situated between the Colo-
rado River and the Pacific Ocean with equal propriety as to the
131 particular lands in controversy here. The effect of such a holding would be to give to the proviso as broad a scope as the granting clause to which it is appended. In other words, to hold that while purporting to make a grant to the Southern Pacific Company to aid in the construction of a railroad from a point at or near Tehachapa Pass by way of Los Angeles to the Texas Pacific Railroad, at or near the Colorado River, the grant in effect was defeated by the proviso.

While the Atlantic and Pacific Company had, at the time of the grant to the Southern Pacific Company, a clear present and prospective right to all lands embraced within the primary limits of its grant, I am of opinion, for the reasons stated, that it had no right of any nature to any particular piece of land within the indemnity limits prior to its selection; and as the lands in question here never were selected by that company, but were selected and (except in one case) patented to the Southern Pacific Company, under the direction of the Land Department; that the patents are valid, unless excepted from the grant to the Southern Pacific Company, by reason of the alleged facts respecting the Mexican grant San José, or by reason of that provision of the act of July 27, 1866, which declares

"that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

132 In the 3d section of the act of July 27, 1866, is to be found the terms of the grant to the Southern Pacific Company as well as that to the Atlantic and Pacific Company, since the act of March 3, 1871, refers to section 18 of the act of July 27, 1866, and that in turn to the 3d section of the same act for the terms of the grant. In addition to the proviso to which the grant to the Southern Pacific Company was made subject by the act of March 3, 1871, the grant to that company was also made subject to the provision that if the route it was authorized to designate should be found to be upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, "as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." The grant to the Atlantic and Pacific Company was the prior grant, and the amount of land granted to it was ten sections per mile on each side of its road when it passes through a State. This amount, by the provision annexed to the grant to the Southern Pacific Company, is to be deducted from the grant to that company where the routes are upon the same general line; and as the grant to the Southern Pacific Company was also ten sections per mile on each side of its road, it results that no land was granted to the Southern Pacific Company where the routes of the two roads are upon the same general line. The allegations of the bill, which upon demurrer are to be taken as true, being that the route of the Southern Pacific Railroad Company as located and constructed is upon the same general line as that of the Atlantic and

133 Pacific Railroad Company as designated under the act of July 27, 1866, and that all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, I am of opinion that in this respect the bill states a good cause of action. I am also of opinion that the allegations in respect to the Mexican grant San José are sufficient, if true, to invalidate the patents. The allegations show that that grant was sub judice at the date of the grant to the Southern Pacific Company, to wit: March 3, 1871, and that the lands in controversy were claimed to be within the boundaries of the Mexican grant up to March 1, 1872. If such was the fact the lands in controversy were not public lands within the meaning of the grant to the railroad company. (Newhall v. Sanger, 92 U. S., 792; Doolan v. Carr, 125 U. S., 617; United States v. McLaughlin, 127 U. S., 428.) It is argued by counsel for some of the defendants that the San José grant was one by specific boundaries, and that it having been ultimately ascertained by the Government that the lands in controversy were not embraced within those boundaries they were all the time public lands, and therefore subject to the grant to the railroad company. It is for the very reason that the grant was one by specific boundaries, coupled with the alleged fact that the lands in controversy were within the claimed limits of that grant at the time of the grant to the railroad company, that prevents the latter grant from attaching to them. (Authorities supra.) But one other point remains to

be considered, and that is that the bill shows on its face such laches as that a court of equity should refuse to grant any relief, at least as against
134 those who are purchasers from the railroad company. It is sufficient to say, in response to this, that the case here is not one in which the Government has allowed its name to be used for the sole benefit of a private person, in which event it would be a mere nominal complainant, but here the Government is the real party complainant, seeking the enforcement of its own rights, and is therefore not bound by any statute of limitations nor barred by any laches of its officers, however gross. (U. S. v. Beebe, 127 U. S., 338.) It results from these views that the demurrers in each of the cases should be overruled, with leave to the defendants to answer within the usual time.

Ordered accordingly.

Ross,
District Judge.

(Endorsed): Nos. 67, 68, 69, and 88. U. S. circuit court, southern district of California. The United States of America, complainants, vs. The Southern Pacific Railroad Company, et als., defendants. United States of America, complainants, vs. The Colton Marble & Lime Co. et al., defendants. Opinion filed May 27th, 1889. Wm. M. Van Dyke, clerk.

135 *Opinion of district judge.*

In the circuit court of the United States, ninth circuit, southern district of California.

UNITED STATES v. COLTON MARBLE AND LIME CO. ET ALS.	No. 88.
UNITED STATES v. SOUTHERN PACIFIC RAILROAD CO. ET ALS.	Nos. 67, 68, and 69 consolidated.

When these cases, which were argued and submitted together, were before the court on demurrers to the amended bills (39 Fed. Rep., p. 132) it was held that the grant to the Atlantic and Pacific Railroad Company of date July 27, 1866, conferred upon that company no right of any nature to any particular piece of land within the indemnity limits of that grant prior to its selection, and, as a consequence, that the fact that lands were within such indemnity limits did not exclude them from the subsequent grant to the Southern Pacific Railroad Company of date March 3d, 1871, because of that provision of the act of July 27, 1866 (to which the act of March 3d, 1871, referred for the terms of the grant to the
136 Southern Pacific Company), which reads: "Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company." But because the amended bills showed on their face that the lands in controversy, which are within the indemnity limits of the grant to the Atlantic and Pacific Company and within the primary limits of that to the Southern Pacific Company, were at the time of the

grant to the Southern Pacific Company claimed to be within the limits of the Mexican grant San José, which latter grant, it was alleged, was then sub judice, and because of that provision of the grant to the Southern Pacific Company to the effect that if the route it was authorized to designate should be found to be upon the line of any other railroad route to aid in the construction of which lands had been theretofore granted by the United States, as far as the routes are upon the same general line, the amount of land theretofore granted should be deducted from the amount granted to the Southern Pacific Company, coupled with the fact, then alleged and by the demurrers admitted, that the routes of the two roads were upon the same general line, the amended bills were considered by the court to state, in each of those respects, good cause for annulling the patents issued to the Southern Pacific Railroad Company.

Since the ruling upon the demurrers the bills have been still further amended, and the cases are now submitted for decision upon the proofs taken and the master's report.

137 The bills as last amended omit the fact theretofore alleged that the routes of the two roads are upon the same general line, and the question decided upon the demurrers in respect to that point is therefore no longer involved. The allegation of the present bills in regard to that matter is that the two routes "cross each other in the State of California, as will more particularly appear" from a certain annexed map. The fact that is made the basis of the exception in question is that the two routes shall be upon the same general line, not that they cross each other. If the two routes are in fact upon the same general line, and the Government relied upon that fact for a recovery, it was of course essential that the fact be alleged. Not being alleged it can not avail the complainant even if the proof shows that it exists.

In respect to the "present and prospective" clause of the act of July 27, 1866, I adhere to the views expressed when the cases were considered on demurrer, in so far as concerns the lands then and now involved, namely, lands within the indemnity limits of the grant to the Atlantic and Pacific Company, and do not care to add anything to what was then said on that point in regard to such lands.

One question remains for decision in each of the cases, namely, should patents issued to the defendant company be annulled upon the ground that the defendant, though having the same name, is a different corporation from that to which the grant was made, and that the company to which the grant was made did not build the road and thereby earn the

138 granted lands? And in the consolidated cases, Nos. 67, 68, and 69, there remains for decision the further question, does the case show that the lands in controversy were at the time of the grant to the Southern Pacific Railroad Company within the claimed limits of the Mexican grant San José, and was that grant then sub judice?

The affirmative of both of these questions is urged with much earnestness on the part of the Government.

The Southern Pacific Railroad Company was originally incorporated December 2d, 1865, under a general law of the State of California, approved May 20, 1861 (Stat. Cal., 1861, p. 607), entitled, "An act to provide for the incorporation of railroad companies and the management of the affairs thereof and other matters relating thereto." The act among other

things authorized such corporations "to receive, hold, take, and convey, by deed or otherwise, the same as a natural person might or could do, such voluntary grants and donations of real estate and other property of every description, as shall be made to it, to aid and encourage the construction, maintenance, and operation of such railroad." The act also provided that it should be lawful for two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets, and franchises in such manner as should be agreed upon by the board of directors of such companies so desiring to amalgamate and consolidate their interests. By the act of Congress, approved July 27, 1866 (14 Stat., 292), creating the Atlantic and Pacific Railroad Company, and empowering it to construct and maintain a continuous railroad and telegraph
139 line from Springfield, Missouri, to the Pacific coast, Congress recognized the Southern Pacific Railroad Company, organized as aforesaid, and authorized it to connect with the Atlantic and Pacific Railroad at such point, near the boundary line of California, as the Southern Pacific Company should deem most suitable for a railroad to San Francisco.

For the purpose of aiding the construction of the line authorized to be built, and thereby securing the safe and speedy transportation of mails, troops, munitions of war and public stores, Congress, by act of July 27, 1866, granted to the Atlantic and Pacific Railroad Company a right of way over the public domain, and also made to it a grant of public lands along the route; and the railroad, so to be constructed, was declared to be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and to such regulations as Congress might impose for restricting the charges for government transportation. By section 18 of the same act, the Southern Pacific Railroad Company was given similar grants of land, subject to the limitations and conditions provided in the act, and was required to construct its road under like regulations as to time and manner as provided in respect to the Atlantic and Pacific Company. The grant thus made to the Southern Pacific Railroad Company was accepted by it on the 24th of November, 1866, and on January 3d, 1867, it filed in the office of the Commissioner of the General Land Office a map showing its definite line of route from
140 a point on the southerly edge of the Bay of San Francisco, in a southeasterly direction, to a point on the east line of the State of California on the Colorado River, near the Needles. The Southern Pacific Railroad Company was not authorized by its original charter to extend its road to the Colorado River. But with a view to further the intent of the act of Congress of July 27, 1866, and to enable the Southern Pacific Company to take the benefit of the grant thereby conferred upon it, the legislature of the State of California, on the 4th of April, 1870, passed an act entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company" (Stat. of Cal., 1870, p. 883), which reads as follows:

"Whereas by the provisions of a certain act of Congress of the United States of America entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the State of California, approved July 27, 1866,' certain grants were made to, and certain rights, privileges, powers, and authority were

vested in and conferred upon, the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the State of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the State of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad

141 so as to reach the eastern boundary line of the State of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privileges hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in, said company by the said acts of Congress, and any act of Congress which may be hereafter enacted."

Shortly prior to this, and at the same session of the legislature, a general act was passed authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, act of March 1, 1870, Stat. 1869–'70, p. 107. But the act of April 4th, 1870, in terms authorized the Southern Pacific Railroad Company to file new and amendatory articles of association, and this for the avowed purpose of enabling it to more perfectly and completely conform to the act of Congress of July 27, 1866; and the rights, privileges, and powers conferred by the act of April 4th, 1870, on the Southern Pacific Railroad Company, were given to it, its successors and assigns.

This State legislation, as was decided by the Supreme Court in the case of California v. Pacific Railroad Company, 127 U. S., p. 44, was not nec-

142 essary to empower the Southern Pacific Company to build the line of road authorized by the act of Congress of July 27, 1866, and thereby to earn the granted lands, for the reason that the right to do so was fully conferred by Congress itself. But it was enacted to remove all doubt in respect to the company's power to construct the road and for the expressly declared purpose of enabling it to comply with the act of Congress and thereby to receive the benefits conferred.

It is stipulated by counsel in these cases that on the 11th of October, 1870, the Southern Pacific Railroad Company, the San Francisco and San José Railroad Company, the Santa Clara and Pajaro Valley Railroad Company, and the California Southern Railroad Company availed themselves of the aforesaid acts of May 20, 1861, and April 4th, 1870, of the State legislature, and duly filed articles by which they amalgamated and consolidated themselves into a new corporation under the name and style of the Southern Pacific Railroad Company, and did thereby vest in such new corporation their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims, and demands of every kind, the object and purpose of the new corporation being declared in the articles to be "to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the State of California, through the city and county of San Francisco, the

counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado River, in the southeastern part of the State of California, a distance of seven
143 hundred and twenty miles, as near as may be; also a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, a distance of three hundred and twenty-four miles, as near as may be. * * * *"

Such was the Southern Pacific Railroad Company when Congress passed the act of March 3d, 1871. 16 U. S. Stat., 573. By that act Congress incorporated the Texas Pacific Railroad Company, with power to construct and maintain a continuous railroad and telegraph line from Marshall, in the State of Texas, to a point at or near El Paso; thence through New Mexico and Arizona to San Diego, pursuing as near as might be the thirty-second parallel of latitude. To aid in its construction Congress gave it, also, the right of way over the public domain, and made to it a grant of public lands along the route. The nineteenth section provided:

"That the Texas Pacific Railroad Company shall be, and is hereby, declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: Provided, That said road shall be subject to the use of the United States for postal, military, and all other governmental services at fair and reasonable rates of compensation not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference
144 in the use of the same for the purpose aforesaid." The twenty-third section of the act is as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: Provided, however, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

In the case of the Southern Pacific Railroad Co. v. Poole et als., 12 Sawyer, 544, it was contended that at the date of the passage of the act of Congress of March 3d, 1871, the Southern Pacific Railroad Company was not authorized by its charter to build the line of road from Tehachapa Pass, by way of Los Angeles, to connect with the Texas Pacific road, and, as by the twenty-third section of that act, that company was 'only authorized, subject to the laws of California, to construct a line of railroad from a point at or near Tehachapa Pass,' etc., the grant was necessarily inoperative and void. The court accepted the fact as there stated that at the time of the passage of the act of Congress the company did not have,
145 according to the laws of California, the legal capacity to build the road on the line designated, and yet held against the contention.

But, according to the stipulation of counsel in these cases, the fact was not as there stated. At the time of the passage of the act of Congress of March 3d, 1871, the Southern Pacific Railroad Company was, according to the stipulation of counsel, existing under the articles of amalgamation and consolidation, which was its charter, of October 11th, 1870, entered into pursuant to the provisions of the State act already referred to; and, as has been seen, one of the purposes of the corporation, as expressly declared in those articles, was to construct, own, maintain, and operate "a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, a distance of three hundred and twenty-four miles, as near as may be."

By the act of March 3d, 1871, Congress made this State corporation, with that State authority, one of its agencies in the establishment of the national highway provided for, and authorized it, "subject to the laws of California, to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six," with the proviso already quoted.

146 Here was not only a plain recognition by Congress that the Southern Pacific Railroad Company of California, existing at the time of the grant of March 3d, 1871, under the articles of amalgamation and consolidation of October 11th, 1870, was the same Southern Pacific Railroad Company to which the grant of July 27, 1866, was made, but the authority to build the road designated conferred on that company by the act of March 3d, 1871, was in terms made subject to the laws of California. Those laws, as has already been pointed out, not only authorized two or more railroad corporations to amalgamate and consolidate their interests and to amend their articles of incorporation, but the State act of April 4th, 1870, expressly declared that the powers therein conferred upon the Southern Pacific Railroad Company, its successors and assigns, were for the very purpose of enabling it, its successors and assigns, to more fully and completely comply with and perform the requirements, provisions, and conditions of the act of Congress of July 27, 1866, and any other act or acts of Congress that might be thereafter enacted.

Pursuant to this State authority, recognized by and made a part of the Congressional grant of March 3d, 1871, the Southern Pacific Railroad Company, on the 15th of April, 1871, filed in the proper office of the State amended articles of incorporation, and on the 12th of August, 1873, it filed, together with the Southern Pacific Branch Railroad Company, articles of amalgamation and consolidation under the name of the Southern Pacific Railroad Company, in both of which articles one of the purposes is stated to be the building of the line from San Francisco through
147 the several named counties, in a southeasterly direction, to the Colorado River, and the building of the line from Tehachapa Pass, by way of Los Angeles, to connect with the Texas Pacific at or near the Colorado River, and thus to secure to itself the grants, rights, and privileges conferred upon it by the Congressional grants.

While by the several articles of amalgamation and consolidation a new corporation, in one sense, was formed, each was substantially and practically the same Southern Pacific Railroad Company mentioned in the acts of Congress, and had for its main purpose the building of the lines of railroad therein designated and the obtaining of the land grants for doing so. Congress, in passing the act of March 3d, 1871, evidently did not consider that the Southern Pacific Railroad Company, by entering into the articles of amalgamation and consolidation of October 11th, 1870, and thereby, in one sense, becoming a "new" corporation, had become a distinct and independent one; for in that very act it designated the Southern Pacific Railroad Company to which that act applied as the same Southern Pacific Railroad Company to which the act of July 27, 1866, applied. Not only so, but the act of March 3d, 1871, in terms authorized that company to build the designated road subject to the laws of California, which laws, as has been shown, expressly authorized the amalgamations and consolidations and the amendments of articles that were made. There was, therefore, Congressional as well as State legislation, authorizing the articles of amendment, amalgamation, and consolidation, and I can see no just ground for holding that the defendant company, which it is
148 conceded built the required road within the designated time, was not the company to which the grant was made.

In other ways, also, the defendant company has been recognized as the Southern Pacific Railroad Company to which the act of March 3d, 1871, applies. It has been so recognized by the appointment of commissioners from time to time as the road was being built, to report in regard to its construction; by the acceptance of the road by the President, in its entirety, as having been duly completed under and by authority of the act, and by the use of the road by the Government in the transportation of its mail, military, stores, etc., pursuant to the provisions of the act. Manifestly, the defendant company can not justly be held subject to the burdens imposed by the act and yet not entitled to the benefits conferred by it as a consideration for those burdens.

Besides, as said by Judge Sawyer, in the case of the Southern Pacific Railroad Co. v. Poole et als., supra, "section 2 of the Atlantic and Pacific act, imported into the Texas and Pacific act by virtue of section 23 of the latter and section 18 of the former, giving to the Southern Pacific Railroad Company of California 'the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions' prescribed in the former act, expressly says the lands are granted to the company, its successors and assigns. These words 'successors and assigns' of course mean something. If the consolidated company, with amended articles of incorporation, is not technically the same corporation referred to in the
149 Texas Pacific act, it is substantially and practically so. If not, it is certainly its successor or assign, and is thus within the express provisions of the grant."

The points above considered are common to all of the cases and dispose of case No. 88. In the consolidated cases Nos. 67, 68, and 69 the question in respect to the Mexican grant San José remains to be determined.

That grant was for the place called San José and in conformity with the deseño attached to the petition for the grant and within the boundaries

therein given. The grant was made by Juan B. Alvarado, at the time governor of Upper California under the Mexican Government, and received the approval of the departmental assembly. The claim thereto was presented in September, 1852, by the grantees to the Board of Land Commissioners pursuant to the provisions of the act of Congress of March 3d, 1851, entitled "An act to ascertain and settle the private land claims in the State of California" (9 Stat. at Large, 631). The claim was confirmed by the Board of Land Commissioners, and in December, 1854, the district court, to which the case had been taken on appeal, confirmed the decrees of the Board, giving to each of the three claimants an equal undivided one-third part "of the lands of San José granted by Juan B. Alvarado, governor of California, to Ignacio Palomares and Ricardo Vejar, on April 15th, 1837, and regranted by said governor on March 14, 1840, to said Palomares and Vejar and to Louis Arenas, as described in the grant first mentioned and the map to which the same referred, and which boundaries fully appear from the act of judicial possession,"
150 described as follows: "Commencing at the foot of a black willow tree, which was taken for a corner, and between the limbs of which a dry stick was placed in the form of a cross; thence westerly nine thousand seven hundred (9,700) varas to the foot of the hills called 'Las Lomas de la Puente,' taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from the said San José to the Puente, making a cut (caldura) on one of the limbs with a hatchet; thence northerly ten thousand four hundred (10,400) varas to the creek (arroyo) of San José, opposite a high hill where a large oak was taken as a boundary, in which was placed the head of a beef and some of its limbs chopped; thence easterly ten thousand six hundred (10,600) varas to the creek (arroyo) of San Antonio, taking for a landmark two young cottonwoods which stand near each other, on the bark of which crosses were made; thence southerly nine thousand seven hundred (9,700) varas to the place of beginning." The decree of the district court became final in 1857. In 1858 the surveyor-general for California caused the land thus granted and confirmed to be surveyed, the survey being made by Deputy Surveyor Hancock. That survey did not include any portion of the lands in controversy here. It was approved by the surveyor-general for California on the 14th of January, 1860, but the case shows that it did not receive the approval of the Commissioner of the General Land Office.

On the 14th of June, 1860, Congress passed an act entitled "An act to amend an act entitled an act to define and regulate the jurisdiction
151 of the district courts of the United States in California in regard to the survey and location of confirmed private land claims" (12 Stat. at Large, 33), by which the district courts were given authority to order into court for examination and adjudication the survey of such private claims. This act, however, as was held by the Supreme Court, did not apply to surveys made prior to its passage unless they had been approved by the surveyor-general and had been "at the time of the passage of the act returned into the district court, or in relation to which proceeding were then pending for the purpose of contesting or reforming the same."

The grant claimants were not satisfied with the Hancock survey, and subsequent to the passage of the act of June 14, 1860, brought it before

the district court for review, in supposed conformity with the provisions of that act; but that court, finding that the act did not apply to that survey, on November 21, 1867, dismissed the proceedings and remitted the papers to the surveyor-general. In the mean time Congress had passed the acts of July 1, 1864 (13 Stat., ch. 194); and July 23d, 1866 (14 Stat., 220). The act of July 1st, 1864, was entitled "An act to expedite the settlement of titles to lands in the State of California," and by its sixth section provided that it should be the duty of the surveyor-general for California to cause all private land claims finally confirmed to be accurately surveyed and plats thereof to be made whenever required by the claimants; provided, that each claimant requesting a survey and plat should first deposit in the district court of the district within which the land was situated a sufficient sum of money to pay the expenses of such
152 survey and plat and of the publication required by the first section of the act.

The act of July 23d, 1866, was entitled "An act to quiet land titles in California," the 8th section of which provided: "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, to 'expedite the settlement of titles to lands in the State of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor-general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such lands, and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general laws of the United States: *Provided*, That nothing in this act shall be construed so as in any manner to interfere with the right of bona fide preëmption claimants."

153 On the 9th of January, 1868, the surveyor-general for California reported to the Commissioner of the General Land Office that an application had been made to him by one of the grant claimants for a survey of the grant, and in response to that report the Commissioner directed that the Hancock survey, made in 1858, and approved by the surveyor-general January 4, 1860, be published in accordance with the provisions of the act of Congress of July 1, 1864. Instead of doing so, the surveyor-general, it seems, caused another survey of the grant to be made in August of that year, to wit, 1868, by Deputy Surveyor Thompson, which survey included a portion of the lands involved in cases 67, 68, and 69, and was approved by the surveyor-general.

Both the Hancock and Thompson surveys were subsequently before the Commissioner, and afterwards before the Secretary of the Interior for consideration and decision, the claimants contending that the lines of the

Thompson survey correctly represented the lines of the grant; and the question of survey was so pending at the time of the grant to the Southern Pacific Railroad Company of March 3d, 1871. That question, as the record shows, related to the true location of the natural calls of the grant, and was finally determined by the Secretary September 20, 1872, by which the lines as represented by the Thompson survey were rejected and those of the Hancock survey, with some modifications, adopted—the direction of the Secretary being "that the lines of the survey of San José be run as follows: Commencing at the willow at the southeast cor-
154 ner at the point designated by Hancock as 'large rock in center of water pool, agreed on as the place where the black willow of the juridicial possession once existed;' thence westerly along the base of the mountains, so as to include the springs near the ravine, to the black walnut; thence northerly to the oak of the Tueaja; thence northeasterly to the Botello oak; thence easterly in a direct line to a point on the arroyo of San Antonio 9,700 varas north of the black willow, and thence southerly along said arroyo of San Antonio to the place of beginning."

In accordance with these instructions another survey of the grant was made by the surveyor-general, upon which a patent was issued; and as thus surveyed and patented none of the lands in controversy were included in the lines of the grant.

While the final result of these proceedings was a conclusive determination that as a matter of fact none of the lands in controversy ever were within the true lines of the San José grant, they also show beyond doubt that some of them were claimed by the grant claimants to be within the boundaries of the grant, and that such claim was made and maintained at the time of the Congressional grant to the Southern Pacific Railroad Company of March 3d, 1871.

It is contended that the surveyor-general had no authority to cause the Thompson survey to be made while the previous survey of Hancock was pending and undetermined, and that the Thompson survey was never considered by the Commissioner of the General Land Office or the Secretary of the Interior "as a survey, but only as an exhibit."

155 Let all of this be admitted, and the fact that is determinative of the question as to whether the lands in controversy here were embraced by the grant to the Southern Pacific Railroad Company of March 3d, 1871, remains the same. Considered only as an "exhibit" the Thompson survey, representing ad it did what the claimants contended were the true lines of the grant, was and is evidence of the fact that they claimed that the lands embraced by that survey (including a portion of the lands in controversy here) were within the boundaries of the Mexican grant; and that claim was asserted up to the time of the final decision of the Secretary of the Interior, in September, 1872. It is not the validity of such claim, but the fact that it was made that excludes the lands embraced by it from the category of public lands within the meaning of the railroad land grants, if excluded at all. (Doolan v. Carr, 125 U. S., 632.)

It is urged that because the San José was a grant by specific boundaries and was confirmed with the same boundaries no land that was not finally ascertained by the Land Department to be within those boundaries is excluded from the railroad grant if otherwise within its limits. This is practically to wipe out entirely the doctrine announced by the Supreme

Court in Newhall v. Sanger, 92 U. S., 761; Doolan v. Carr, 125 U. S., 638, and in other cases, that the status of lands included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it was such that they were not included in the phrase "public lands" of the railroad land grants. "Those Mexican claims," said
156 the court in Doolan v. Carr, "were often described or attempted to be described by specific boundaries. They were often claims for a definite quantity of land within much larger outboundaries, and they were frequently described by the name of a place or rancho. To the extent of the claim when the grant was for land with specific boundaries or known by a particular name, and to the extent of the quantity claimed within outboundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican Government which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located."

In the case of the United States v. McLaughlin, 127 U. S., 428, it was held that as, in the case of a floating grant the Mexican Government retained the right to locate the quantity granted in such part of the larger tract described as it saw fit, and as the Government of the United States succeeded to the same right, the latter Government might dispose of any specific tracts within the exterior limits of the grant, provided a sufficient quantity was left therein to satisfy the private grant; and, accordingly, that in cases of floats, the railroad land grants might attach to lands within such exterior boundaries, provided a sufficient quantity of
157 land was left therein to satisfy the private grant. But while thus modifying what was generally understood to have been the effect of the decision in Newhall v. Sanger, the court, in United States v. McLaughlin, proceeded to declare (127 U. S., p. 455) that "the reasoning of the court in Newhall v. Sanger is entirely conclusive as to all definite grants which identified the land granted, such as the case before it then appeared to be;" but went on to show that it was not fairly applicable to floats.

I do not see how there can well be a decision more directly to the point that in cases of Mexican grants by specific boundaries lands which are claimed by the grantees to be within those boundaries are excluded from the category of public lands to which the railroad land grants apply, if at the date of the latter the question of the true location of the boundaries of the private grant is pending and undetermined. If to such a case the doctrine of Newhall v. Sanger and the other cases approving it does not apply, it does not apply to any case; for it does not apply to floats, as was pointed out in United States v. McLaughlin, and grants by specific boundaries and by name manifestly stand upon the some footing.

It is contended that as the San José grant was one by specific boundaries the claim ceased to be sub judice when the decree of confirmation became final in 1857; that nothing then remained to do but apply the de-

scription to the ground and survey the lines. If so, precisely the same thing is true in respect to floats. When the decree of confirmation in such
158 a case became final, nothing remained to do but locate the quantity and survey the lines. In either case that duty, except in the matter of such surveys as come within the provisions of the act of Congrsss of June 14, 1860, devolved upon the Land Department of the Government and was subject, first, to the action of the surveyor-general, and then, in turn, to that of the Commissioner of the General Land Office and the Secretary of the Interior. The records of the Land Department put in evidence in these cases clearly show that the contest over the survey of the San José grant was in relation to the identity of the natural calls of the grant, the grantees claiming that the true location of the trees and other objects called for in the specific description of the grant would include within those boundaries a portion of the lands in controversy here. If that contention was well founded undoubtedly the lands so included would not be public lands of the United States. It would seem plain enough, therefore, that until that question was finally decided it could not be known whether the lands so claimed were public lands or not. Under the laws of the United States the duty of deciding that question devolved, as has been said, upon the officers of the Land Department. Its ultimate determination was vested in the Secretary of the Interior. Had he decided that the lines as represented by the Thompson survey were the true boundaries of the grant, such decision would of course have been equally conclusive as the one that was made, and the patent following it would have been a conclusive determi-
159 nation that all the lands embraced within those lines were within the boundaries of the Mexican grant and, therefore, not public lands to which the railroad grant only could attach. It would seem plain, therefore, that until the contested question of survey was decided it could not be known whether the lands involved in the contest were public or private lands; and until such decision became final, lands so involved were sub judice and not public lands within the meaning of the railroad grant act, according to the ruling in the cases referred to as I understand them.

It results from these views that in case No. 88 there should be a decree dismissing the bill without costs, and in the consolidated cases Nos. 67, 68, and 69, a decree in favor of complainant in so far as concerns the tracts of land in controversy which were at the time of the grant to the Southern Pacific Railroad Company of March 3d, 1871, within the claimed limits of the San José grant, and as concerns the remainder of the lands in controversy in the consolidated cases, a decree for the defendants, each party to pay its own costs.

Ross, *District Judge.*

(Endorsed:) Nos. 88 and 67, 68 & 69 consolidated. U. S. circuit court, southern district of California. United States of America vs. The Colton Marble & Lime Co. et al.; United States of America vs. The Southern Pacific Railroad Co. et al. Opinion of Hon. E. M. Ross, district judge. Filed March 6th, 1891. Wm. M. Van Dyke, clerk.

160 *Opinion of circuit judge.*

UNITED STATES
vs.
SOUTHERN PACIFIC R. R. CO. ET AL.

Sawyer, circuit judge: After a careful consideration of the question, I am satisfied that those lands embraced in cases No. 67, 68, and 69, alleged to have been within the boundary of the rancho San José, and to have been sub judice at the date when the railroad grant attached to the lands granted, were subject to the legislative grant. I have studied with great care the cases of Newhall vs. Sanger, 92 U. S., 761; Doolan vs. Carr, 125 U. S., 638, and U. S. vs. McLaughlin, 127 U. S., 428, relied on, and I am unable to find anything in either of them requiring or justifying the exclusion of those lands from the operation of the grant. In my judgment those lands now in question were not in any just sense, or in the sense contemplated in the decisions in those cases, sub judice at any time after the decree of confirmation, defining by specific metes and bounds the precise lands confirmed, became final even if they were so (which is at least doubtful) at any prior time. That decree pointing out, specifically, the precise lands confirmed, forever settled the right of the parties, and after it became final there was no possible ground for claiming anything outside of those boundaries. None of these lands are within the boundaries designated in the decree, or within the exterior boundary of the juridical possession upon which the decree was based. Indeed, as I understand the matter, they all lie from at least one to three miles
161 from those boundaries, and could not by any possiblity have been taken in by any survey conforming to the decree, or have been lawfully included in any survey. After that decree became final the claimants might just as well have claimed land ten, fifteen, or more miles as from one to three miles distant. The decree settled the rights of the parties and the limits of the land granted. And that is final. It could not lawfully be changed by the surveyor or any other authority. In the language of the Supreme Court in U. S. vs. Halleck, 1 Wal., 455–6: "The decree is a finality, not only on the question of title, but as to the boundaries which it specifies." Affirmed: U. S. vs. Billing, 2 Wal., 448; Higueras vs. U. S., 5 Wal., 834; Dodge vs. Perez, 2 Saw., 652.

In the Fossat case, 2 Wal., 649, the Supreme Court held that: "If a California land claim has been confirmed by a decision of the district court under the act of March 3, 1851, and decision of confirmation, fixing the boundaries of the tract, stands unreversed, a survey under it is the execution of that decree, and must conform to it in all respects." Now, in this case the decree of confirmation which stands unreversed "fixes the boundaries" of the grant, and the survey under it is not a continuation of the litigation, but "the execution of that decree;" and no lands outside the specfic boundaries so fixed and established, no matter what the confirmees may claim, could lawfully be included in the survey or patent. The rights of the parties are finally settled, and the land to which the confirmees are entitled irrevocably designated and distinctly pointed out.

162 The language of the decree of confirmation is substantially identical with that of the juridical possession, which was ratified and ap-

proved by the granting authorities of Mexcio, and by its adoption in the decree by the courts of the United States it forever settled the question of location between the United States and the claimants, and thereby the lands outside the boundaries ceased to be sub judice. All that remained to be done was to execute the decree by finding the monuments designated, and run the lines between them in a form usual for insertion in the United States patents. There was no discretion whatever left in the surveyor, as there is in the case of a float. Those monuments, and no others, could be lawfully taken, and there was no possible ground for further claiming lands outside the boundaries so specifically designated and pointed out. The language of the decree is clear and unmistakable, and is as follows:

"Commencing at the foot of a black willow treee, which was taken for a corner, and between the limbs of which a dry stick was placed, in the form of a cross; thence westerly nine thousand seven hundred (9,700) varas to the foot of the hills called 'Las Lomas de la Puente,' taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from said 'San José' to the Puente, making a cut (caldura) on one of the limbs with a hatchet; thence northerly ten thousand four hundred (10,400) varas to the creek (arroyo) of San José, opposite a high hill, where a large oak tree was taken as a boundary, in which was placed the head of a beef, and some of its limbs chopped; thence easterly ten thousand six hundred (10,600) varas to the creek (arroyo)
163 of San Antonio, taking for a landmark two young cottonwoods which stand near each other, on the bark of which crosses were made; thence southerly nine thousand seven hundred (9,700) varas to the place of beginning."

There could not well be a more specific description of the corners and landmarks. There are four corners, consisting of certain trees, marked and carefully described, constituting the monuments as specifically described, as surveyors usually describe their monuments; and for straight lines for sides, forming very nearly a parallelogram; and such appears to be the shape of the land on the deseño. No other points or objects could be lawfully taken. Now the land included within these boundaries is the land confirmed, and no other. There was no further ground for litigation. All that was necessary to do was to find the monuments, and run the connecting lines according to the description in the decree. Monuments of this kind may be destroyed and it may become difficult to find them, but that is the misfortune of the parties interested. It does not appear that that was the case here. Monuments are often destroyed when planted by Government surveyors in surveying the public lands, and this occasions much trouble in after years, as this court has had frequent occasion to know from litigation before it, as to boundaries of the public surveys and the location of the monuments officially planted by the United States surveyors.

In this case the record of the juridical possession was referred
164 to in, and made a part of, the petition for confirmation filed before the land commissioners as describing the lands for which confirmation was asked. Thus the claim made upon the record was for these specific lands within the boundaries prescribed by the juridical possession and adopted in the final decree, and no other. It does not appear in the record that any claim was made before the board or court for lands out-

side these boundaries, or that there ever was any contest over lands outside the prescribed boundaries. The juridical possession was a ceremony analogous to livery of seizin at common law, and it defines specifically the lands granted. This juridical possession is, of itself, controlling as to the lands granted. U. S. vs. Graham, 4 Wal., 261–2; U. S. vs. Pico, 5 Wal., 539–40. In this case we have not only the juridical possession, but the decree confirming the grant in accordance with it, and with the claim of the petitioners, as shown by the record; and this decree, whether right or wrong, as we have seen, is final and conclusive. The case was not open thereafter to further contest or claim for lands outside these boundaries. In my judgment that claim for land outside ceased to be sub judice, if it ever was in that condition, at the date when this decree became final. After that no land outside of these prescribed boundaries could lawfully be included in the patent issued under the confirmation, and there was no longer any legitimate or substantial basis for any claim to such lands.

Newhall vs. Sanger, 92 U. S., 761, and Doolan vs. Carr, 125 U. S., 618, present cases entirely different from this. In the former when the
165 general map of the route was filed by the railroad company the claim for confirmation of the Moquelamos grant, within the exterior boundaries of which the lands in dispute were situated, was still pending and undetermined. The grant was afterwards rejected as fraudulent. The claim itself to the grant was, undoubtedly, sub judice, for it was still pending, and the validity of the claim undetermined by the courts. It was held that the grant being still sub judice the lands were not embraced within the railroad grant. The case was decided upon a partial record in which all the facts did not appear. Afterwards, in U. S. vs. McLaughlin, it appeared that the land claimed under the Mexican grant was for a certain number of leagues within the exterior boundaries containing a great many more leagues, a float; and it was held that, since there was ample land left to satisfy the grant, and the right of location was in the Government, the surplus lands were subject to grant, and those within the purview of the railroad grant passed to the railroad company, and the court limited the rule as to lands sub judice, at the time of the railroad grant, to grants by name and grants by specific boundaries, in which all the lands passed to the grantee. U. S. vs. McLaughlin, 125 U. S.

So the case of Doolan vs. Carr, 125 U. S., 618, did not present all the facts, and the court acted upon the hypothesis that the grant was one by name, the "Rancho Las Pocitas" including all the lands within the indicated boundaries. It was substantially so alleged in the offer of proof (see p. 621), and such is the idea conveyed by the proofs offered as stated on pages 622 and 623. It does not appear in that
166 record that the supreme court modified, as it did the decrees of the board and of the district court, and limited the confirmation to two square leagues, or that the exterior boundaries covered from ten to twelve square leagues, that it was therefore, in fact, a mere float, a grant of quantity, within boundaries containing nearly six times the quantity confirmed. But all this appears in the subsequent case, involving lands in the same grant, "Las Pocitas," U. S. vs. Curtner, 38 F. R. 1, the decision in which was concurred in by both the circuit justice and circuit

judge, the former with Justice Strong having originally dissented in Newhall vs. Sanger. The court in Newhall vs. Sanger doubtless supposed that the grant called "Moquelamas" was a grant by name, with definite boundaries. This clearly appears from what is said in U. S. vs. McLaughlin, 127 U. S., 455–6. Said the court, among other things, "there is really nothing in the decision of Newhall vs. Sanger in conflict with the views here expressed, because the court did not have before it the case of a floating grant" (456). And in that case, the validity of the grant itself had not been decided when the railroad grant was alleged to have attached. And in Doolan vs. Carr the court supposed that "Las Pocitas" was a grant by name, including all land within the boundaries given, and acting upon this idea as seems evident from what it said in 125 U. S., 631 and 632, and in the third headnote pages 118–9 it considered, and perhaps properly, too, the case to be still sub judice under its loose and
167 extremely vague general boundaries as described, until they should be properly and specifically determined. The boundaries in both these cases were general, loose, and vague to the last degree, and much latitude in the exercise of discretion by the surveyor must, necessarily, have been exercised. In those cases, until the survey had been made and approved, and the land granted located, the case was, perhaps, sub judice. The San José grant, now under consideration, presents no such case. It had been awarded to the claimants as long ago as 1857, by a final decree, which not only confirmed the grant, but pointed out the boundaries by specific corners, carefully described, and courses connecting them, which no surveyor could lawfully disregard, change, or modify; and I find nothing in the cases cited to warrant me in saying that, after that specific decree became final, either the grant or its boundaries were in any just or legal sense, or in the sense as used in the cases cited, sub judice. The grant was undoubtedly sub judice from the filing of the petition till the entry of the final decree confirming and identifying the lands granted by specific metes, bounds, and monuments, clearly described.

Prior to the entry of that decree confirming the grant, a grant like that in question to the railroad company under the decisions in the cases cited would not have taken effect, even if the grant were afterwards rejected as fraudulent, upon lands confessedly within the specific boundaries of the grant as described and claimed in the petition, it being a grant cov-
168 ering all the lands within the boundaries. But these lands now under consideration never were within the boundaries described in the juridical possession, for which the petition was filed, and in the final decree, which follows literally the juridicial possession. Like much of the land claimed to be within the Moquelamos grant, these lands were entirely outside the exterior boundaries of the grant. I doubt very much whether they ever were sub judice, although the lands described in the grant undoubtedly were. They were miles outside the boundaries described in the juridicial possession and decree, and could in no way be lawfully brought within the grant. In U. S. vs. McLaughlin the main question was "Whether the land in question was actually within the outside limits of the pretended Moquelemos grant?" (127 U. S., 441.) Had it not been, as a large part was found by the court not to be, although so earnestly and vigorously claimed, that ended the question. Now, in this

case, the lands under consideration never were within the outside limits of the grant, as indicated by the juridicial possession, and that ought to end the matter.

But the Supreme Court itself, in the case of U. S. vs. McLaughlin, the very last case on the subject, has decided the point, substantially, that the mere claim that lands are within the boundaries of a grant does not make them sub judice even in a float, within the meaning of that phrase, as used by the court in the three cases cited. That decision authoritatively settles the point and does not leave it open for further discussion. Nearly all
169 the lands involved in that suit lay east of the Jack Tone road, which followed the line between sections 7 and 8. The complainants earnestly insisted that the eastern boundary of the Moquelamos grant was the Sierra Nevada range, eighty miles distant, and if not that range, then that Bear Mountain, twenty-four miles east of the Jack Tone road, was the narrowest eastern limit of the grant. The most of the testimony in that case, both by complainants and respondents, was introduced upon this single point to show the eastern exterior boundary of the grant, the complainants insisting that it was the Sierra Nevada range, and if not that, then at least Bear Mountain; and the respondents, that it was the Jack Tone road. And the court opens the discussion on page 441 by saying that the first question is, "whether the land in question was actually within the outside limits of the pretended Moquelamos grant?" Several pages are then devoted to discussing the evidence on this point, which was the great point of discussion in the case, and the court then concludes: "On the whole, we are satisfied that the outside boundary limits of the Moquelamos grant, as called for in the grant itself, do not extend east of the Jack Tone road, or the edge of the hills commencing near the same. This result would dispose of the present case with regard to nearly all the land in question therein" (pp. 447–8). Thus, as to the great body of lands in question, the court put the decision expressly on the ground that although within the boundaries as claimed, they were, in fact, outside the real boundaries of the grant.

Then, the mere claim that the lands were within the boundaries of the
170 grant did not make them sub judice within the meaning of that term as used by the court; for this point is wholly outside and independent of the distinction between floats and grants by specific boundaries or names, on which distinction the few lands west of the Jack Tone road were still given by the court to the railroad company as not coming within the decision of Newhall vs. Sanger. It seems to me that there is no evading this authoritative decision, that a mere claim that lands are within the exterior boundaries of a grant, when not so in fact, does not make them sub judice even in the case of a float, much less in a grant with specific bounds, finally and irrevocably confirmed and fixed by such specific bounds.

I am, therefore, clearly of the opinion that these lands now under consideration were not sub judice in the sense as the terms are used in the cases cited when the railroad grant attached, and that the grant is valid and passed a good title.

On this point I regret to find that I cannot agree with my associate. On all the other points discussed by my associate in the opinion now delivered I fully concur with his views.

It has been suggested that the ruling on demurrer as to indemnity lands adopted in the opinion of my associate, in which I concur, and being the lands in question, is inconsistent with the ruling in Southern Pacific Railroad Co. vs. Wiggs, decided by me, and reported in 43 F. R., 333. When that case was decided the decision on demurrer in this case had not fallen under my notice. But the cases are not inconsistent and
171 can well stand together. In that case the decision was not put upon the ground that the company's title attached to lieu lands at any time before the selection, but on the ground that under the special provision of that act they, as well as those within the primary grant, were withdrawn from preëmption and other disposition before provided by law, and that, although the company's title did not vest till selection, still that, until it had an opportunity to select, nobody else could acquire or initiate a preëmption or other right under existing laws. And that the preëmption claim then in question was initiated and afterwards proved up and the patent issued, while the lands were withdrawn and not subject to sale as the laws then stood except to the company, and while awaiting an opportunity for the company to select, and were not then subject to such disposition, Congress had power, had it seen fit to do so, to withdraw any lands from preëmption without reference to other grants, and without conferring any rights upon another to the lands. But that act did not purport or attempt, nor could it have done so if attempted, to limit the power of Congress to make subsequent grants to such lands before any other right in them had vested, and the grant now in question was a subsequentone made by Congress itself; and as no other right had yet attached to the lands, it was in no way affected by the provisions for withdrawal from preëmption and sale by the prior act. I concur with the district judge wherein he held on demurrer as follows: 'To lands to which no title could attach prior to selection I do not think the Atlantic & Pacific Company had, at the time of the grant to the Southern
172 Pacific Company, a present or prospective right. If it had such right to the particular lands in suit, it had the same right to all other lands to which the right of selection might have applied. And since, by the act making the grant, the Atlantic & Pacific Company was empowered to construct its road along the thirty-fifth parallel of latitude to the Colorado River 'at such point as may be selected by the company for crossing, thence by the most practicable and eligible route to the Pacific' Ocean, the present and prospective right of that company, prior to selection, might be applied to any public land situated between the Colorado River and the Pacific Ocean with equal propriety as to the particular lands in controversy here. The effect of such a holding would be to give the proviso as broad a scope as the granting clause to which it is appended."

The question whether the clause in the provision of section 23 in the act of 1871, "that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company," or any clause in the act of 1866, in view of all the facts of the case, defeats the grant to respondent as to those lands, which lie within the primary limits of the grant, does not arise in this case, and, therefore, need not be discussed. Yet, since there is an intimation, in the opinion of the district judge, upon the demurrer, although the question was not involved, and, consequently, there was but a partial consideration of the

point; that such is the case I refer to it now for the purpose only
173 of saying that I do not wish to be considered as acquiescing in that view. I shall not at this time decide or discuss that question, but leave it for full discussion and decision when the point properly arises.

Under the views expressed, and those of my associate on the other points discussed by him, in which I have concurred, and under the provisions of section 650 of the Revised Statutes of the United States, the bills, as to all the lands involved in the several cases before us, must be dismissed, and it is so ordered.

(Endorsed:) Nos. 88 and 67, 68 and 69 consolidated. U. S. circuit court, southern district of California. United States of America vs. The Colton Marble & Lime Co. et al. United States of America vs. The Southern Pacific Railroad Co. et al. Opinion of honorable Lorenzo Sawyer, circuit judge. Filed March 6th, 1891. Wm. M. Van Dyke, clerk.

174 *Stipulation of facts.*

In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE COLTON MARBLE & LIME COMPANY, O. T. DYER, W. S. WILSON, and ARCHIBALD, defendants.
} Stipulation.

It is hereby stipulated and agreed between the plaintiff and the defendants herein that the value of the land in controversy in this case and mentioned and described in the bill filed herein exceeds $5,000.00.

It is further stipulated that the making of this stipulation shall not be construed to shorten the time for entering the appearance of the defendants in this action, and that such appearance may be entered on Monday, the 3rd day of December, 1888, and with the same time to demur or plead of the bill as if this stipulation had not been made.

Dated Nov. , 1888.

GEORGE J. DENIS,
United States Attorney.
JOSEPH H. CALL,
Assistant U. S. District Attorney.
H. C. ROLFE,
JOSEPH D. REDDING,
175 and CHAPMAN & HENDRICKS,
Solicitors for Defendants.

(Endorsed:) No. 88. In the U. S. circuit court, ninth circuit, southern district of California. United States of America vs. Colton Marble & Lime Co. et al. Stipulation. Filed, November 28th, 1888. Wm. M. Van Dyke, clerk.

176 In the circuit court of the United States, southern district of California.

THE UNITED STATES OF AMERICA
vs.
THE COLTON MARBLE AND LIME COMPANY et al. } Stipulation.

It is stipulated and admitted by the parties to this suit—

1st. That there is now on the land in suit herein, which has been cut from said land during the last year, 1,347 cords of wood.

2nd. That the defendants have heretofore cut and removed from said land 3,689 cords of wood, making altogether 5,036 cords of wood cut by the defendant from said land.

H. C. ROLFE,
JOSEPH D. REDDING,
CHAPMAN & HENDRICK,
Solicitors.

This stipulation is not to be construed as shortening the time for entering our appearance or to demur, plead, or answer to the bill.

H. C. ROLFE,
JOSEPH D. REDDING,
CHAPMAN & HENDRICK,
Solicitors for Dfdts.

177 (Endorsed:) 88. The U. S. cir. ct., s. dist. of Cal. U. S. vs. Colton Lime & Marble Company. Stipulation. Filed December 1st, 1888. Wm. M. Van Dyke, clerk.

178 In the circuit court of the United States, ninth circuit, southern district of California.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE COLTON MARBLE AND LIME COMPANY and others, respondents. } Number 88.

It is hereby stipulated and agreed, by and between the parties to this suit and their respective solicitors, that this case shall be heard by the court, tried, and determined upon the evidence which has been and may be taken in the case of the United States vs. Southern Pacific Railroad Company et al., No. 68 on the docket of said court, so far as the evidence therein adduced may be applicable and pertinent, without prejudice to either party to introduce such further evidence as may be competent.

JOSEPH H. CALL,
Special Asst. U. S. Attorney.
H. C. ROLFE & CHAPMAN & HENDRICK,
Solicitors for Defendants.

179 (Endorsed:) No. 88. In U. S. circuit court, so. dist. of Cal. United States vs. Colton Marble & Lime Company et al. Stipulation. Filed February 6th, 1890. Wm. M. Van Dyke, clerk. Jos. H. Call, spec. asst. U. S. atty.

180 UNITED STATES OF AMERICA, COMPLAINANT,
vs.
COLTON MARBLE & LIME CO. ET AL., DEFENDANTS. } No. 88.

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In the circuit court of the United States, ninth circuit, southern district of California.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE COLTON MARBLE & LIME COMPANY ET al., defendants. } No. 88.

Be it remembered that on the twentieth day of March, A. D. 1890, and on the several days thereafter to which the examination was regularly adjourned, as hereinafter set forth, at my office, rooms 23 and 24, over the Farmers and Merchants' Bank, southeast corner of Main street and Commercial street, in the city of Los Angeles, in said district, before me, Chas. L. Batcheller, examiner in chancery of said court, personally appeared the several witnesses whose names are hereinafter set forth, who were produced and examined on behalf of the respective parties to the above-entitled cause.

Mr. Joseph H. Call appeared as counsel for the complainant, and Mr. Joseph D. Redding appeared as counsel for the defendants.

The following is a correct record of the proceedings:

183 *Stipulations and admissions.*

TUESDAY, *March 20th*, 1890—3 *o'clock p. m.*

Appearances: Joseph H. Call, for complainant; Joseph D. Redding, J. A. Anderson, and Edwin Baxter, for respondents.

The EXAMINER. The taking of testimony in this case is commenced by consent, all the parties waiving notice of the taking, and by agreement of the parties the testimony is taken orally, the notice of the desire to have the testimony taken orally being waived.

It is stipulated by the parties that a shorthand reporter shall be employed by the examiner to take down the testimony and transcribe the same, and that his per diem of ten dollars per day shall be taxed as costs in the case, and it is further stipulated that the transcript of the said shorthand re-

porter's notes shall be of the same effect as if taken by the examiner himself in longhand after being signed by the examiner. It is stipulated that publication of the testimony shall take place instanter, and that each party may have daily copy of the testimony.

184 Mr. CALL. The parties appear by their solicitors and waive all informalities. The plaintiff offers in evidence a stipulation in this case, as follows: "In the circuit court of the United States, southern district of California. United States of America vs. Colton Marble and Lime Company and others. Stipulation. It is stipulated and admitted by the parties to this suit: 1st. That there is now on the land in suit herein, which has been cut from said land during the last year, 1,347 cords of wood. 2. That the defendant has heretofore cut and removed from said land 3,689 cords of wood, making altogether 5,036 cords of wood cut by the defendant from said land. (Signed) H. C. Rolfe, Joseph D. Redding, Chapman & Hendrick, solicitors."

Mr. REDDING. "For respondents."

Mr. CALL. "This stipulation is not to be construed as shortening the time for entering our appearance, or to demur, plead, or answer to the bill. H. C. Rolfe, Joseph D. Redding, Chapman & Hendrick, solicitors for respondents." Now, will you admit—how shall we get that in evidence?

Mr. REDDING. I admit that as a fact in this case.

Mr. CALL. The respondents admit that is a fact.

Mr. REDDING. It is admitted that the subject-matter of suit in this case exceeds the value of $5,001, exclusive of costs and interest.

Mr. CALL. Plaintiff offers in evidence the following stipulation, which has been entered into by and between the parties to this suit, as follows:

185 "In the circuit court of the United States, ninth circuit, southern district of California. United States of America, complainant, vs. The Colton Marble and Lime Company and others, respondents. No. 88. It is hereby stipulated and agreed by and between the parties to this suit and their respective solicitors, that this case shall be heard by the court, tried, and determined upon the evidence which has been and may be taken in the case of the United States against the Southern Pacific Railroad Company and others, No. 68, on the docket of said court, so far as the evidence therein adduced may be applicable and pertinent, without prejudice to either party to introduce such further evidence as may be competent. (Signed.) Joseph H. Call, special assistant U. S. attorney; H. C. Rolfe and Chapman & Hendrick, solicitors for defendants.

Mr. REDDING. It is stipulated by and between the respective parties to this case, by and between their respective solicitors, that the land in controversy in this case is situated in the same category as the lands in the case 68, pending in this court, with the following exceptions, namely, that the land is not located within the claimed limit of any Mexican grant, Spanish grant, or any other foreign grant, nor have patents been issued by the United States to the Southern Pacific Railroad Company for these lands, and that with these exceptions the evidence taken in case 68, both for the complainant and respondents in that case, is now applicable for the complainant and respondents in this case.

Mr. CALL. And the whole thereof is now introduced in evidence?

Mr. REDDING. Yes, sir.

186 Mr. CALL. Subject to the objections which have been entered as to such evidence.

Mr. REDDING. And with the said exceptions with reference to the Mexican and Spanish grants and the nonpatenting of the land. Furthermore, that if any further evidence is offered in case 68 by any of the parties thereto, with the exception of evidence that may appertain to the patenting of such lands, or to the question of the land being within the claimed limits of the Mexican and Spanish grants, that said evidence shall be applicable to this case and be considered offered in this case.

It is stipulated that this case shall be argued when case 68 is argued and submitted with case 68.

Examination continued until March 21st, 1890, at nine o'clock a. m.

187 *Testimony of S. P. Rhoades.*

S. P. RHOADS, called for complainant.

Witness sworn.

Direct examination:

Q. 1. Mr. CALL. Where do you reside?

A. In Los Angeles.

Q. 2. How long have you lived here?

A. A little over three years.

Q. 3. What business are you engaged in?

A. I am in the City Brick Company.

Q. 4. What is the business of the City Brick Company?

A. Well, making brick and selling it; burning it.

Q. 5. Do you handle any wood?

A. Yes, sir.

Q. 6. In connection with that?

A. Yes, sir.

Q. 7. Do you buy wood by the acre or by the stumpage?

Mr. CALL. This is case 88.

A. What is the question?

Q. 8. State whether or not your business in handling or dealing in wood enables you to know the value of wood, in and around Los Angeles per cord?

A. Yes, sir; it does.

Q. 9. Can you state what stumpage is worth in this neighborhood and around about here?

A. Well, the only wood that we ever bought on the stump was one case above Newhall, near Kent, about six miles from Newhall.

188 Q. 10. Now, state what wood is now worth in the market per cord in Los Angeles?

A. Well, it depends upon the kind of wood somewhat.

Q. 11. Well, the kind of wood that grows upon the mountains generally, the Sierra Madre Mountains?

A. Oak or pine are worth—oak wood is probably worth about eight dollars, live-oak wood and the mountain pine is worth about ten.

Q. 12. In Los Angeles?

A. Yes, sir.

Q. 13. Can you state what wood was worth per cord at San Bernardino or Colton in the fall of 1888?

A. I couldn't state; no, sir; I never bought any there and I don't know the price.

Q. 14. What do you pay per cord or by the car for shipping wood from Kent to Los Angeles?

A. I think our freights run from twenty-five to thirty dollars a car, according to the way it is loaded.

Q. 13. How many cords do you put in a car?

A. Why, cars will average about nine cords.

Q. 14. And that is how much per cord, about three or four dollars?

A. Yes; between three and four dollars, I think.

Q. 15. Is Kent about the same distance from Los Angeles as Colton and San Bernardino?

A. I should think it was about the same distance.

Q. 16. And the rate would be about the same then?

A. Yes, sir; I should think so.

189 Q. 17. What is wood worth on the stump in the mountains four or five miles from the railroad, as it runs?

A. We pay a dollar a cord.

Q. 18. For stumpage?

A. For stumpage; yes, sir.

Q. 19. Do you know of any selling at a higher rate?

A. Yes, sir; we bought some at a higher rate that was close to the road in the canyon, down in the level land.

Q. 20. What did you pay for that?

A. We paid $1.50 per cord.

Q. 21. How far was that from the railroad?

A. About two miles or two and a half.

Q. 22. What is the character of the wood generally in the mountains?

A. All we have bought was pine.

Q. 23. And oak is more valuable, I suppose?

A. No, sir; the mountain pine is the most valuable wood we have for our purposes.

Q. 24. But in the market, used for fuel?

A. Well, it is fully as high, if not higher. This mountain pine is full of pitch, you know, and is valuable wood.

The MASTER. The reading and signing of the testimony of the witness Rhoads, this day given, are waived.

190 Mr. CALL. It is stipulated and admitted that the value of the wood which has been cut by the defendants upon the land in suit herein was at the time the same was cut, and at the time this suit was brought, of the value of one dollar per cord, making altogether the value of $5,036, and if the plaintiff shall recover in this suit it shall be for that amount.

Mr. REDDING. Yes, sir.

191 *Certificate of examiner.*

I certify that the foregoing depositions were taken pursuant to agreement and consent of the attorneys for the respective parties, at the places stated, at the time set forth in said depositions, in my presence and in the presence of counsel for the respective parties to the cause in said caption entitled; that, previous to giving his testimony, each of the witnesses in said

depositions named was by me duly sworn to tell the truth, the whole truth and nothing but the truth in said cause; that said depositions were, except in so far as they were taken down in writing by the examiner, taken down in short-hand writing and transcribed by various stenographic reporters, pursuant to stipulation and agreement of counsel; that said depositions, after being so transcribed, were read by or by me to the said witnesses, and signed by them, respectively, except in those cases where such reading and signed were by agreement of said counsel waived as in said depositions set forth; and that I have retained said depositions for the purpose of delivering the same with my own hand to the court for which they were taken.

Accompanying said depositions, and forming part thereof, are the several exhibits introduced in connection therewith and referred to and specified therein.

I further certify that I am not attorney nor of counsel for any of the parties to said cause, nor in any way interested in the event thereof.

192 In witness whereof I have hereunto set my hand this 12th day of June, A. D. 1890.

CHAS. L. BATCHELLER,
Examiner in chancery of said court.

(Endorsed:) Filed June 12th, 1890. Wm. M. Van Dyke, clerk.

193 *Order allowing appeal.*

At a stated term, to wit, the January term, A. D. 1891, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, held at the court room in the city of Los Angeles, on Monday, the ninth day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Present: the honorable Erskine M. Ross, district judge.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald and W. S. Wilson, defendants. } No. 88.

The said complainants, The United States of America, having this 9th day of March, 1891, being a day in the January term, A. D. 1891, of said circuit court, by Joseph H. Call, esq., special assistant United States attorney for the southern district of California and counsel for complainants, prayed an appeal to the Supreme Court of the United States to reverse the decree heretofore, to wit, on the 6th day of March, 1891,

194 being a day also in January term, A. D. 1891, of the said circuit court, filed and entered of record in said circuit court, and it appearing to this court that the matter in dispute in said cause, exclusive of costs, exceeds the sum or value of five thousand (5,000) dollars, and that the complainants herein are entitled to the allowance of an appeal operating as a supersedeas, the said complainants having taken the said appeal within the time allowed by law for the supersedeas, it is ordered that the said complainants be, and the said complainants hereby are, permitted and allowed to prosecute an appeal to the Supreme Court of the United States from the said final decree filed and entered as aforesaid, and it is hereby ordered that the said appeal operate as a supersedeas in this suit.

195 In the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California.

THE UNITED STATES OF AMERICA,
vs.
THE COLTON MARBLE AND LIME COMPANY, O. T. Dyer, Archibald, and W. S. Wilson. } No. 88.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the southern district of California, do hereby certify the foregoing one hundred and ninety-four (194) pages, numbered from one (1) to one hundred and ninety-four (194), inclusive, and comprised in one (1) volume, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled cause; and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said circuit court this 18th day of June, A. D. 1891.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

196 UNITED STATES OF AMERICA, *ss:*

To the Colton Marble and Lime Company, O. T. Dyer, Archibald and W. S. Wilson, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the ninth day of May, A. D. 1891, pursuant to an appeal by the United States from the final decree of the United States circuit court, southern district of California, dismissing the second amended bill of complaint on the 6th day of March, 1891, in a suit wherein the United States is plaintiff and you are defendant in error, to show cause, if any there be, why the decree in said suit mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 11th day of March, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

E. M. Ross,
U. S. District Judge and one of the Judges of the Circuit Court.

197 Indorsed: J. S. Chapman. Baker Blk. Original. In the Supreme Court of the United States. The United States of America vs. The Colton Marble and Lime Company et al. Citation. Filed May 9th, 1891. Wm. M. Van Dyke, clerk. Service accepted this 18th day of March, 1891. Chapman & Hendrick, Solicitors for def'ts.

(Indorsement on cover:) Supreme Court U. S. Received Jul. 25, 1891. Clerk's office. No. 1301. The United States, appellant, vs. The Colton Marble and Lime Company, O. T. Dyer, Archibald, and W. S. Wilson. S. California C. C. U. S. Filed July 25, 1891. 14775.